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United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niuk-
kanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and
Naturalization Service, United States Department of
Justice, JOHN WILSON, Officer in Charge, Immi-
gration and Naturalization Service Office,
Appellees.

APPELLANT'S OPENING BRIEF

*Appeal from the United States District Court for the
District of Oregon*

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Appellees.

APPELLANT'S OPENING BRIEF

*Appeal from the United States District Court for the
District of Oregon*

JURISDICTIONAL STATEMENT

This is an appeal from an Order Dismissing Ap-
pellant's Amended Petition for Writ of Habeas Corpus
and Complaint for Injunctive Relief to Prevent Agency
Action.

The jurisdiction of the District Court was invoked
under Title 28, United States Code, Section 2241, 62

Stat. 964, and Title 5, United States Code, Section 1009, 60 Stat. 237.

The jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under Title 28, United States Code, Section 2253, 62 Stat. 967, and Title 28 United States Code, Section 1291, 62 Stat. 929.

The validity, and the interpretation of statutes of the United States are involved, namely: The Act of October 16, 1918, 40 Stat. 1012, as amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008, now Section 1251(a)(6)(c), Title 8, United States Code.

Reference is made to the pleadings, the Petition (Tr. Rec. 5-16),* the Amended Petition (Supplemental Transcript of Record), the Writ of Habeas Corpus (Tr. Rec. 16), and the Return to the Amended Petition (Tr. Rec. 18-20). The Order dismissing the Amended Petition appears at page 23-24 of the Transcript of Record.

STATEMENT OF THE CASE

Appellant is an alien, having been born in Finland, November 24, 1908. He entered the United States in 1909 and has resided in this country continuously since then. He is duly registered under the Alien Registration Act (Tr. 4, 5).

* As used in this brief, the reference (Tr.) refers to the transcript of the hearing before the Immigration Service (Exhibit 1), and (Tr. Rec.) refers to the transcript of the hearing in District Court which is printed as part of the record on appeal.

Appellant and his parents have resided in Portland, Oregon for about 33 years where Appellant follows the trade of painting. His father is a tailor who works only four or five days a week because of ill health (Tr. 174-5). His mother suffers from diabetes and impaired eyesight (Tr. 173-174) and Appellant renders financial and other aid to his parents (Tr. 173, 175). His mother is aged 78 and his father is a couple of years older (Tr. 171).

Appellant is the only surviving son of his parents, a brother having been killed during World War II on a ship near Wake Island (Tr. 172). Appellant himself was drafted in 1944 and served 95 days in the Army, receiving an Honorable Discharge for medical reasons (Tr. 8, 9).

On June 17, 1952, a warrant for the arrest and deportation of Appellant was issued by John P. Boyd, District Director of the Immigration and Naturalization Service and the same was served upon Appellant on or about September 12, 1952. The basis of the warrant was the allegation that Appellant has been a member of the Communist Party of the United States after entry into the United States during the years 1937-39.

A hearing was held before Louis C. Hafferman, Special Inquiry Officer on May 11, 1953 in Portland and thereafter, Mr. Hafferman issued a written decision holding Appellant deportable. A timely appeal to the Board of Immigration Appeals of the Department of Justice was taken and on September 8, 1953, said Board issued an order dismissing the appeal.

On February 2, 1955, pursuant to motion of Appellant, a further hearing was held before Mr. Hafferman

as Special Inquiry Officer in reference to Appellant's application for suspension of deportation. Appellant's application was denied and an appeal to the Board was again taken. In an opinion and order dated May 13, 1955, this appeal was dismissed.

On December 13, 1954, Appellant filed a Petition for a Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action in the United States District Court for the District of Oregon, and later, an Amended Petition setting forth the denial of Appellant's application for suspension of deportation. Upon return of the writ and answer to the complaint, a hearing was held in District Court. Thereafter, the Honorable Gus J. Solomon, Judge, entered an order on March 6, 1956, dismissing the complaint, discharging the writ, and remanding Appellant to the custody of Respondent for deportation.

The questions raised by this appeal include the constitutionality of the Act of 1950 under which Appellant was arrested, whether Appellant is a deportable person under that act, and whether the denial of Appellant's application for suspension of deportation was capricious and an abuse of administrative discretion.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to declare unconstitutional the Act of October 16, 1918, as amended by the Act of June 28, 1940, and as amended by the Internal Security Act of 1950, because said act contra-

venes Article I, section 9(3) of the Constitution of the United States, and the First and Fifth amendments to the said Constitution.

2. The District Court erred in finding that Appellant is a person subject to deportation under the above acts in that there was no substantial, probative or reasonable evidence to support a finding that petitioner was a member of the Communist Party of the United States after entry into the United States, or if he was a member, that said membership was more than nominal.

3. The District Court erred in failing to reverse Respondent's denial of Appellant's application for suspension of deportation because said denial was arbitrary, capricious, and an abuse of discretion.

ARGUMENT

SECTION 22 OF THE INTERNAL SECURITY ACT OF 1950 IS UNCONSTITUTIONAL.

1. The Act violates due process of law.

The government seeks to deport Appellant under the following statute:

Title 8, United States Code, section 1251 (a):

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"(6) is or at any time has been after entry, a member of any of the following classes of aliens:

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States;"

While the Supreme Court has upheld the constitutionality of the statute in question, we believe that the decision in *Galvan v. Press*, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737, was erroneous and will be overruled. We feel compelled to raise the issue at this time, both to preserve our position during the litigation in this case, and because there is presently on the docket of the Supreme Court the case of *Rowoldt v. Perfetto*, No. 34, October Term, 1956, which challenges the Court's decision in *Galvan*.

The first objection to the statute is that it is special legislation. Under this law—unique in American jurisprudence—aliens are expelled for membership in a specifically named organization, the Communist Party. Membership in an organization in itself is the basis of classification by the Act; in effect it says that membership alone is the sign of guilt. The Act closes its eyes to motive, scienter, and acts of its victims; mistake and repentance alike fail to redeem those condemned for mere membership.

Not only does the Act offend the deepest sense of fair play by condemning persons because of bare membership in the Communist Party, but for all practical purposes it proposes to expel aliens who might have been members of this organization by a legislative determination that all members of that organization were guilty of thinking, saying, or doing things against the best interests of the nation. Even if Congress were correct in its judgment that the Communist Party is a pernicious organization, it cannot attach its guilt to in-

dividuals by reason of their membership alone. Such a fiat is, on its face, irrational and shocking to the inborn sense of fairness which is, in truth, the essence of due process.

Due process requires that a deprivation of liberty "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia v. New York*, 291 U.S. 502, 525; 78 L. Ed. 940, 54 S. Ct. 505.

Guilt by association—this is the nub of the statute—is a barbarous and uncivilized offender of the standards of the Constitution as expounded by our courts. If an alien commit an act against this nation, if he works as a knowing partner in a conspiracy to harm the land which has accepted him, then let him be punished and deported. But to rule that membership alone in an organization constitutes guilt, without proof that the alien was aware of its evil purposes or an active participant in its subterfuges and plots, is the nadir of decency.

Nearly twenty years ago, the climate of opinion and the state of public knowledge was far different than it is today. Then, thousands joined the Communist party to further social and economic objectives which were espoused, not alone by Communists but also by members of legitimate and long-established political parties. Hundreds of thousands believed the Communist Party to be just another legitimate organization. Intelligent persons who now are "expert witnesses" in our Courts admit to having been "duped" by Communism in the nine-

teen-thirties. Certainly a simple Finnish immigrant laborer might reasonably be excused for accepting the appearance of an organization that fooled so many others.

Nor is the Supreme Court's position sound, taken in *Harisiades v. Shaughnessy*, 342 U.S. 580, 96 L. Ed. 586, 72 S. Ct. 512, that substantive due process does not apply to the expulsion of aliens. It is conceded by all that aliens are entitled to procedural due process. So they must be entitled to substantive due process, for there is only one due process clause.

Harisiades is based upon three erroneous assumptions. First, it is said that the alien resides here on sufferance which is not a matter of right but only of permission. But due process protects privileges as well as "rights," such as the privilege of government employment. *Slowchower v. Board of Higher Education*, 350 U. S. 551, 100 L. Ed. 405, 76 S. Ct. 497; *Wiemann v. Updegraff*, 344 U.S. 183, 97 L. Ed. 216, 73 S. Ct. 215; *United Public Workers v. Mitchell*, 330 U.S. 75, 91 L. Ed. 754, 67 S. Ct. 556.

It is also stated in *Harisiades* that the power of expulsion is "largely immune from judicial inquiry or interference" because it is interwoven with the war power, the conduct of foreign affairs, and the maintenance of republican form of government. 342 U.S. 588-89.

But in reality expulsion of aliens is not a tool of foreign policy, and deportation seldom involves negotiations with foreign governments. The mere fact that an alien is the subject of deportation proceedings does

not make the process of deportation a matter of foreign policy any more than the fact that an alien is prosecuted for a crime makes that proceeding into an arm of foreign policy.

Finally, it is implied that the alien brings all of his trouble upon himself by not obtaining citizenship. Even if it were true, this would be no cause for denying him fair play. However, the assumption is fraught with obvious error, for some of the aliens cannot qualify for citizenship because of restrictive laws and restrictive administration of these laws. Moreover, some aliens erroneously believe themselves to be citizens.

The basic attitude which underlies the decisions in both *Galvan* and *Harisiades* is that aliens are here by sufferance and the nation owes them nothing because they contribute nothing in return for the hospitality. This view is as false as it is novel. The Founding Fathers welcomed immigration, and through immigration this nation prospered and developed. Immigrant hands toiled to link the country with railroads, harvest our crops, cut our forests, tend the looms, and make the steel that built America. The continent was settled by immigrants who gave their children to populate the land. The immigrants of today have only remote ties with the countries of their origin. Appellant has lived all but less than a year in America, has married an American citizen and been as a father to his wife's American child. Aliens as a group, and Appellant in particular, are entitled to decent treatment under law. Due process—fairness—is a mighty shield to protect the liberties of all persons in this land.

To deprive the alien of its comfort is to weaken the moral fiber of America.

2. The Act is a Bill of Attainder and an Ex Post Facto Law.

A bill of attainder is "a legislative act which inflicts punishment without judicial trial," *Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356. As the Supreme Court said in *United States v. Lovett*, 328 U.S. 303, 315: "... legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial are bills of attainder prohibited by the Constitution."

The Act in question here is clearly within these definitions, and the only basis on which the Court in *Galvan* and *Harisiades* ruled to the contrary is the assertion that "deportation is not punishment."

This view of banishment seems incomprehensible to aliens whose lives have been spent in America, whose roots are here, and whose families depend upon them for care and livelihood. To uproot individuals such as Appellant and to blithely deny that "punishment" is thereby inflicted is to ignore the nature of the particular deprivation being inflicted upon a particular person. *Garner v. Board of Public Works*, 341 U.S. 716, 722. Not all expulsions amount to punishment, but some do, and the Court should examine each case on its merits. The test, as set forth in *Garner*, is whether the deprivation is based upon general standards which are reasonable. If such

standards exist, the deprivation is not punishment; otherwise it is. Inasmuch as the provisions of the Act have no reasonable basis, and are specific in application because they virtually name the individuals to which they apply, "punishment" is inflicted and the Act is a bill of attainder.

That the Act is an *ex post facto* law within the ban of the Constitution is equally clear. It imposes sanctions upon Appellant because he allegedly was a member of the Communist Party at a time when party membership was legal. At the time Appellant was alleged to have been a member, there was no finding that the Communist party advocated violence. As late as 1943, the Supreme Court in *Schneiderman v. U. S.*, 320 U.S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 held that the question of whether the Communist Party advocated violence was an open one. Not until 1950 did Congress make a legislative finding that the Communist Party indeed advocated violent overthrow of the government.

Even if the bare membership of Appellant is conceded *arguendo*, such affiliation took place at a time when Appellant had no notice, judicial or legislative, that his association with Communists was wrongful and that as a result he would be subject to deportation. Since the Act imposes a punishment in the form of banishment, it is an *ex post facto* law and should be struck down as violative of the United States Constitution.

3. The Act violates the First Amendment.

In *Harisiades*, an extensive and unjustifiable interference with freedom of speech was sanctioned. There, the statute required the government to prove that the organization to which the alien belonged advocated violence before he could be expelled.

The Act here goes beyond that considered in *Harisiades*. No finding that the Communist Party, or the alien in question, advocated violence is necessary. Deportation follows from mere membership.

Thus the invasion of freedom of speech permitted in *Harisiades* has been compounded in the 1950 Act. Certainly as applied to this Appellant, the Act constitutes an unjustifiable interference with his right of expression and association and therefore it should be held unconstitutional.

PETITIONER IS NOT A PERSON SUBJECT TO DEPORTATION IN THAT THERE IS NO SUBSTANTIAL, PROBATIVE OR REASONABLE EVIDENCE UPON WHICH TO BASE A FINDING THAT PETITIONER WAS A MEMBER OF THE COMMUNIST PARTY OF THE UNITED STATES AFTER ENTRY INTO THE UNITED STATES, AND THAT IF HE WAS A MEMBER, THAT HE WAS MORE THAN A NOMINAL MEMBER.

- 1. There is no substantial, probative or reasonable evidence that Appellant was a member of the Communist Party.**

The only witnesses called by the government to support its contention that Appellant was a member of the Communist Party of the United States were Walter R. P. Wilmot and Lee Arthur Knipe. Both swore that they knew Appellant as a member of the Communist Party.

With respect to Knipe's testimony, the Board of Immigration Appeals discounted it and used it in an "accumulative" sense only. Certainly his entire testimony taken as a whole is incredible and should be discounted (Tr. 64 ff.).

Wilmot's testimony is also of the sort which does not justify expulsion of the Appellant. He swore that he knew Appellant as a member of the Communist Party, but he was able to recall only one specific closed party meeting at which he saw him, and only one specific occasion when he saw Appellant pay party dues.

The entire testimony of the witness Wilmot is vague and lacking in the specificity which lends the color of

reality to the lifeless corpse of past experience. A veil of ignorance clouds the most important aspects of Wilmot's attempt to tie Appellant into the Communist party. Part of this may be accounted for by Wilmot's admission that he was a heavy drinker during his membership in the party (Tr. 49-50). Another aspect which diminishes the value of Wilmot's testimony is the fact that during the period when Appellant was alleged to be a member of the Communist party, there were a great many groups, such as the Workers Alliance, which were not Communist organizations, but which were subject to varying degrees of Communist influence and infiltration. Appellant, like many other unemployed people during those gloomy years, sought the aid and attended the functions of such organizations without being aware of any sinister connotations which they might have possessed (Tr. 196, 36-38, 28-31). If Wilmot knew Appellant during these years, perhaps it was in connection with Appellant's admitted association with the Workers Alliance, and Wilmot's memory, over the course of seventeen years, has confused the circumstances under which he knew Appellant, if he did (Tr. 200, 203-4).

At the most, Wilmot's testimony can be taken for evidence that Appellant was seen at Communist meetings. But this Court has held that mere attendance at a closed Communist Party meeting is not conclusive evidence of membership in the party. *Bridges v. U. S.*, CA-9, 1952, 199 F2d 811 at 835-836.

We believe that a careful reading of the record in this case must lead to the conclusion that there is in-

sufficient evidence of affiliation by Appellant with the Communist party to justify imposing the extreme sanction of deportation.

2. If Appellant was a member of the Communist Party, the evidence is conclusive that he was merely a nominal member, and as such, he is not a person subject to deportation under the Act.

Even if the record in this case should be construed to support the government's contention that Appellant was a member of the Communist Party, nevertheless, his deportation cannot be permitted because there is no evidence in the record to indicate that Appellant was anything more than a nominal member of the party.

Galvan v. Press, supra, held that the government was under a duty to prove that an alien which it seeks to deport was more than a nominal member of the Communist Party. The Supreme Court stated the rule as follows:

"It must be concluded, therefore, that support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation. It is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party *which operates as a distinct and active political organization*, and that he did do of his own free will." (347 U. S. at 528) (Emphasis added)

The record in this case is devoid of any proof whatsoever that Appellant, even if he was a member of the Party, knew it to be a *political* organization, as distinct from a vehicle to better the *economic* circumstances of

workingmen and the unemployed during the depression. On the other hand, the witness Wilmot swore that the only thing he knew that Appellant actually did in connection with his alleged Communist activity was to help circulate copies of the "Labor New Dealer," a labor paper edited by Wilmot and published by the local C.I.O. (Tr. 19).

The witness Knipe testified that as far as he knew Appellant didn't attend Communist schools or conventions, and didn't distribute any Communist literature (Tr. 70). He also stated that Appellant had never participated in any plots for violent overthrow of the government, and that indeed Appellant didn't seem to advocate such action. Primarily, according to Knipe, Appellant was concerned with problems of unemployment and relief (Tr. 72).

We submit that on this record, it is clear that Appellant was, at most, only a nominal member of the Party. There is nothing to indicate that he was ever aware of the political nature of the Communist party, or indeed, of the Communist movement (Tr. 201-202). All of the evidence indicates that Appellant, far from being a well-read, literate advocate of theoretical Communism, was primarily concerned with "bread and butter" economic issues which affected him personally during the depression.

Under the rule set forth in *Galvan*, we think the government has failed to prove that Appellant knew of the political nature of the Communist Party, if in fact he was a member, and therefore, the case should, at

least, be remanded for Administrative reconsideration. *N.L.R.B. v. Virginia Electric and Power Co.*, 314 U.S. 469, 86 L. Ed. 520, 62 S. Ct. 94; *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454; *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 97 L. Ed. 15, 73 S. Ct. 85.

THE REFUSAL TO SUSPEND APPELLANT'S DEPORTATION WAS AN ABUSE OF ADMINISTRATIVE DISCRETION.

After Appellant's appeal to the Board of Immigration Appeals was denied, he applied for suspension of deportation under the provisions of the Act. Suspension was denied by the Board in an Order dated May 13, 1955, and Appellant's Amended Petition for a Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action included the allegation that the denial of suspension of deportation was an abuse of discretion.

The Order of the Board is judicially reviewable under the decisions in *McGrath v. Kristensen*, 340 U.S. 162, 95 L. Ed. 173, 71 S. Ct. 224; *Shaugnessy v. Pedreiro*, 349 U.S. 48, 99 L. Ed. 868, 75 S. Ct. 591; *Rubenstein v. Brownell*, 206 F2d 449 (CA-DC, 1953), affirmed 346 U.S. 929, 98 L. Ed. 421, 74 S. Ct. 319; *Lim Fong v. Brownell*, 215 F2d 683, (CA-9, 1954); *U.S. ex rel. Matranga v. Mackey*, 115 F. Supp. 45 (DC NY, 1953); *Acosta v. Landon*, 125 F. Supp. 434 (DC Cal, 1954).

The issue on review is whether the Board abused its discretion in denying suspension of deportation.

It will be recalled that at the two hearings, there was no evidence that Appellant was anything more than a nominal member of the Communist Party, if indeed membership was proved at all. There was absolutely no evidence that Appellant at any time has engaged in thoughts, deeds, or spoken words hostile to, or subversive of, the United States or its government. There is absolutely no evidence that Appellant ever advocated the use of force and violence.

On the other hand, in the hearing on Appellant's application for suspension of deportation, he testified that he has always been loyal to the United States, and that he never was a member of the Communist Party (Tr. 198, 203, 204, 220).

The opinion of the Board bases its denial of suspension of deportation on the grounds that Appellant failed to submit evidence that he is actively opposed to Communism; that his answers as to his activities both prior to and subsequent to 1940 were "evasive and unresponsive"; and that he refused during cross examination to give the names of persons attending a meeting of the Oregon Committee for the Protection of the Foreign Born.

We do not think that a fair reading of the record sustains the allegation that Appellant was evasive and unresponsive in his answers. In some cases, Appellant did not know the answer to questions put to him, and he then said so. Appellant is not trained in semantics or in debating. He is a relatively uneducated workingman, and it is easy to see that he did not understand some of

the questions put to him, and did not give answers to others which would satisfy a logician. But these defects spring, it seems to us, from ignorance and fear, rather than calculated deviousness.

It is true that Appellant declined to name others in attendance at a dinner meeting of the Oregon Committee for the Protection of the Foreign Born. It is not clear why this information is even material or relevant to the inquiry inasmuch as there was no evidence that the Committee is subversive or connected with Communism. However, the motive of Appellant in refusing to give the names is clear. He did not want to be a "stool pigeon"—that is, give the names and expose those at the meeting to possible pressures similar to those with which Appellant himself, by bitter personal experience, has become familiar. Appellant's motive in refusing to divulge the names was thus an honorable one; it was a type of conduct which has hitherto been considered noble in American ethics.

It is asserted that there is no evidence that Appellant actively opposes Communism. Clearly, Appellant, his wife and his acquaintances established his loyalty to the United States and his abhorrence of force and violence. Apparently the Government would require Appellant to perform some spectacular act or series of acts to make a public display of his opposition to Communism. Perhaps Appellant should have made anti-Communist speeches from a box in a public park to satisfy the vague requirements mentioned by the Board. In any case, the exact nature of the showing of active opposition to Communism which would be acceptable to the Board is nowhere made

clear in the record. We suggest that the absence of any Communistic leanings combined with an upright and moral life—facts clearly demonstrated at the hearings—are sufficient proof of opposition to Communism. Living a good life is, after all, a rather active way to combat Communism or any social or political evil.

Looking at the record as a whole, we think that Appellant was entitled to suspension of deportation inasmuch as his loyalty was demonstrated and the hardship on his family proved and unquestioned, even by the Board. The denial of suspension was an abuse of discretion and should be reversed by this Court.

The case at bar is quite similar to *Acosta v. Landon*, 125 F. Supp. 434 (DC Cal., 1954). There, the District Court found that there was no evidence “or even suggestion that he ever rejoined the Communist Party, committed any crime or performed any act indicating his moral character was other than good.” This language could be applied to Appellant.

The Court in *Acosta* went on to say that the Board denied the application there because his responses to questions were evasive. This, said the Court, is no ground for denying the application for suspension.

The District Court summed up the matter in words which certainly fit the case at bar:

“As far as *Acosta* is concerned, it might be said that the terrific price for stupid indiscretion seventeen years ago is justified, but it is cruel punishment for this innocent family. Surely it was just such a situation that Congress had in mind when it enacted the statutory provisions for suspension of deportation.”

CONCLUSION

The judgment of the District Court should be reversed and the Government enjoined from deporting Appellant. Even if the Act is constitutional, which we question, there is no evidence that Appellant was a Communist, and certainly no evidence that he was more than a nominal member of the party, if he was a member. Finally, it is clear that even if he is deportable, Appellant should be granted suspension of deportation and the denial thereof was an abuse of discretion which should be remedied by this Court.

Respectfully submitted,

PETERSON & POZZI,
NELS PETERSON,
BERKELEY LENT and
GERALD H. ROBINSON,
Attorneys for Appellant.

No. 15061

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niuk-
kanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and
Naturalization Service, United States Department of
Justice, JOHN WILSON, Officer in Charge, Immi-
gration and Naturalization Service Office,
Appellees.

BRIEF OF APPELLEES

*Appeal from the United States District Court for the
District of Oregon*

FILED

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NOV 12 1956

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United States
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vs.

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Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon

JURISDICTION

The jurisdiction of the district court was invoked under Title 28, United States Code, Section 2241, and Title 5, United States Code, Section 1009. The jurisdiction of the Court of Appeals is invoked under Title 28, United States Code, Section 2253, and Title 28, United States Code, Section 1291.

This is an appeal from an order of the United States District Court for the District of Oregon dismissing appellant's amended petition for writ of habeas corpus and complaint for injunctive relief, discharging the writ of habeas corpus theretofore issued, exonerating the sureties and remanding the appellant to the custody of John P. Boyd, District Director of the United States Department of Justice, Immigration and Naturalization Service, to be held for deportation pursuant to the warrant and order of deportation previously issued.

STATEMENT

The appellant is an alien having been born in Finland on November 24, 1908.

On June 17, 1952, a warrant for the arrest and deportation of the appellant was issued by John P. Boyd, District Director of the Immigration and Naturalization Service, and this warrant was served upon the appellant on or about September 12, 1952. A hearing was thereafter held before Louis C. Hafferman, Special Inquiry Officer, on May 11, 1953, at Portland, Oregon, and on June 30, 1953, said officer issued a written decision holding the appellant deportable for the reason that he had become a member of the Communist Party of the United States after entry into this country. The specific finding was that he had been a member of the Communist Party during the years 1937-1939.

A timely appeal was made from this decision and on September 8, 1953, the Board of Immigration Appeals dismissed the appeal.

The appellant did not ask for suspension of the deportation order within the time provided, but after the expiration of the time defendant's counsel moved that the proceedings be reopened for the purpose of affording the appellant an opportunity to apply for suspension of deportation. The Board of Immigration Appeals denied counsel's motion on October 29, 1954. Thereafter an additional motion to reopen was made and on December 23, 1954, the Board directed a withdrawal of the outstanding order and warrant of deportation and a reopening of the proceedings for the purpose of affording the appellant an opportunity to apply for suspension of deportation. Such application was made and an additional hearing held at Portland, Oregon, which resulted in the issuance of an order denying suspension and dismissing the appeal, said order issued on May 1, 1955. (Exhibit A to the Supplemental Transcript of Record.) The amended petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action was thereafter filed and a hearing held before The Honorable Gus J. Solomon at Portland, Oregon, which resulted in the entry of an order of which the appellant now complains.

Appellant's statement of points upon which he will rely in this appeal varies somewhat from the three specifications of error found on pages 4 and 5 of his brief. Specification of Error No. 3 in the brief appears to be of somewhat narrower scope than the general Statement No. 3 in the statement of points that the appellant was not afforded a fair hearing before the Immigration and

Naturalization Service. The government will attempt, therefore, to discuss the specification of errors as set forth in the appellant's brief and in addition make some comment regarding Point No. 3 as found in the statement of points of appellant on appeal.

SPECIFICATION OF ERROR NO. 1

Appellant states that Judge Solomon erred in failing to declare the Internal Security Act of 1950 and its various predecessors unconstitutional. He asserts that these acts are violative of Article I, Section 9(3) and the First and Fifth Amendments in The Constitution of the United States.

Harisiades v. Shaughnessy, 342 U.S. 580, 96 L. Ed. 586, 72 S. Ct. 512, and *Galvan v. Press*, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737, have decided the questions of constitutionality which the appellant raises here.

Appellant's argument stated in its simplest terms is that the *Harisiades* and *Galvan* cases are wrong. He ignores the fact that whether right or wrong in these two cases the Supreme Court has expressed its opinion that the constitutional questions raised here are not well taken. It is therefore submitted that under the *Harisiades* and *Galvan* decisions the District Court did not err in failing to declare the Internal Security Act of 1950 unconstitutional.

SPECIFICATION OF ERROR NO. 2

Appellant asserts here, as he did below, that there was no substantial probative or reasonable evidence introduced at the deportation hearing to prove that he was a member of the Communist Party.

At that hearing the government called two witnesses—Walter R. P. Wilmot and Lee Arthur Knipe, who both testified under oath that they knew the appellant to be a member of the Communist Party. They testified that they had seen the appellant attend closed meetings of the party at which only members were admitted and also that they had seen him pay his Communist Party dues. Although Knipe was shown to have testified untruthfully during the deportation hearing concerning his record of convictions and thereby lessening his credibility as a witness, his testimony as to the appellant's membership in the Communist Party is corroborated by the witness Wilmot who was a credible and trustworthy witness at that proceeding.

The credibility of witnesses is ordinarily to be determined by the trier of fact—in this instance the Inquiry Officer. *Morikichi Suwa v. Carr*, 88 F. 2d 119 (9 Cir., 1937). It is the inquiry officer in a deportation proceeding who is in the best possible position to observe the demeanor of witnesses and his decision on the question of credibility should therefore rarely be disturbed.

In the case of *Acosta v. Landon*, 125 F. Supp. 434 (9 Cir., 1954), cited by appellant for another reason, the question of credibility of one of the witnesses was

raised. The appellant in that case had been instrumental in having the witness ousted from an executive position in his union and from membership in the union itself.

The appellant argued that the witness was so biased as to render his testimony unbelievable. In refusing to disturb the findings of the Inquiry Officer with regard to the witness' testimony, this court stated as follows:

"In this case the critical issue as to whether Acosta was a member of the Communist Party turned on the credit to be given Chase's testimony. The inquiry officer gave it full credit though this court might have taken a different view of the testimony had the matter been before it de novo. It cannot be said that Chase's testimony was so improbable as to be unworthy of belief. Under such circumstances this court is obliged to accept the inquiry officer's finding." 125 F. Supp. 434, at p. 438.

It is fundamental that the efficient functioning of administrative bodies such as the Immigration and Naturalization Service depends upon their determinations and findings being disturbed by the courts only where such determinations and findings are based upon mere caprice or whim. If the court can find in the record of the proceedings before the administrative body some substantial evidence to support the finding, then such finding should not be disturbed. The scope of judicial review in cases of this type under no circumstances contemplates the substitution of the District or Circuit Court in place of the administrative body.

In the case of *Orvis v. Higgins*, 180 F. 2d 537 (2 Cir.), there appears the following statement:

"We must sustain a general or a special jury ver-

dict when there is some evidence which the jury might have believed, and when a reasonable inference from that evidence will support the verdict, regardless of whether that evidence is oral or by deposition. In the case of findings by an administrative agency, the usual rule is substantially the same as that in the case of a jury, the findings being treated like a special verdict." 180 F. 2d 537, at p. 539.

Also to the same effect see *N.L.R.B. v. Universal Camera Corp.*, 179 F. 2d 749 (1950), where it is stated that the findings of an administrative agency are tantamount to a special verdict and must be sustained when based upon some evidence which a jury or administrative agency might have believed and when a reasonable inference drawn from that evidence will support a verdict or finding.

During the hearings conducted under the warrant of arrest in this case on May 11 and May 21, 1953, two witnesses were called on behalf of the government in an attempt to prove that the appellant was a voluntary member of the Communist Party of the United States from sometime in 1937 until 1939.

The first witness was Walter Robert Patrick Wilmot, who used the name W. B. Ayer while a member of the Communist Party. Wilmot, a citizen of the United States, was residing at the time of the hearing in New York City and testified that he joined the Communist Party in late 1936 or early 1937 at Portland, Oregon (Tr. 12). He went on to state that he eventually was assigned to the waterfront section of the Party and became editor of the Party's paper known as "Labor New

Dealer" (Tr. 13). He further testified that he first met the appellant in the summer or early winter of 1936 and knew him from that time until he, the witness, was put out of the Communist Party. This first meeting occurred at the home of Helmi Burns, who was the witness' secretary on the "Labor New Dealer."

Wilmot stated that he knew the appellant to be a member of the Communist Party, that he saw him pay Communist Party dues in the Gerlinger Building, which was the Communist Party office. His testimony was that appellant paid these dues to James Murphy or Clayton Van Lydegraff, James Murphy being the Secretary of the Portland section of the Communist Party (Tr. 14-15). In response to the question of whether or not he had ever seen the Communist Party book or membership card belonging to the appellant this witness testified that he had seen it as "it was there on the table" (Tr. 15).

The following testimony of witness Wilmot relative to the appellant's attendance at closed meetings of the Communist Party appears quite important and is as follows:

"Q. Now you have stated that you attended closed Communist Party meetings. Did you ever see the respondent, William Albert Mackey, at any of these meetings which you attended?

A. Yes I did.

Q. Did he hold any office in the Communist Party as far as you were aware?

A. To the best of my recollection I think he was a functionary in the Albina group. Secretary I believe. I am not positive of that. That is my impression.

Q. Were you a member of the Albina section at any time?

A. No. But I attended meetings of practically all the branches in my capacity as Editor of the paper, and other things involved, if you want me to explain it." (Tr. 15)

* * *

"Q. Did you know the respondent Mr. Mackey personally?

A. Oh yes.

Q. Did he ever come to your office, that is the office of the 'Labor New Dealer' during your editorship?

A. Yes.

Q. Did you know him personally prior to your joining the Communist Party?

A. I met Mr. Mackey at open or semi-open party functions and at dances and parties before I joined the party, and if I remember correctly, at the Finnish community picnic at Astoria.

Q. Then there is no question in your mind concerning his identification as being the person that you saw at what you have called closed Communist Party meetings?

A. No sir.

Q. Approximately at how many meetings of the Communist Party did you see him?

A. I can't answer that exactly. I went to sometimes three meetings a week for about two years and I know it was Mackey I saw at many. I can't say.

Q. More than one?

A. Oh yes." (Tr. 17)

In addition to his testimony as to appellant's attendance at closed meetings in Portland and the payment of dues, the witness Wilmot testified that appellant had attended a closed meeting at Aberdeen, Washington and had assisted in the circulation of the Communist Party newspaper "Labor New Dealer" (Tr. 19).

The other witness called by the government was Lee Arthur Knipe. His testimony was similar to that of the witness Wilmot in stating that the appellant had been a member of the Communist Party when Knipe had also been a member, and that he saw the appellant at closed meetings of the Party at the Finn Hall in Portland, Oregon (Tr. 66). Not only did this witness see the appellant at thirty to thirty-five closed weekly meetings at the Finn Hall, but also he testified that some meetings were held in his own home and that the appellant attended two or three of these. He stated that the appellant took an active part in the meetings of the Communist Party, and that while he never held any office to the witness' knowledge, he was on the executive board of the branch to which he belonged (Tr. 67-68).

The following testimony of the witness Knipe is quite important on the question of the payment of dues by this appellant, and is as follows:

“Q. Who was the Secretary of the Albina branch during your period of membership?

A. Greta Jessen.

Q. Did she collect dues from the various members of the branch or subsections?

A. She did.

Q. Did you at any time ever see Mr. Mackey pay his dues?

A. I did.

Q. Did you ever see his Communist Party membership book?

A. I did.

Q. Explain in what way or how you were able to see the book.

A. He paid his dues and would hand the book to her and she would paste stamps in the dues

stamp place or she would hand it to him to paste them in.

Q. Did you see it on more than one occasion?

A. Yes, several times." (Tr. 69)

It was found during the hearing and afterward that the witness Knipe had testified untruthfully with regard to his record of prior convictions. This of course would lessen his credibility as a witness. However the testimony of witness Knipe as set forth above, and in its complete form in the Transcript of Testimony, as to appellant's membership in the Communist Party and his payment of dues is corroborated by the witness Wilmot who was not discredited in any way.

An important fact to be remembered throughout this proceeding is that the appellant, while given every opportunity to testify in his own behalf, to deny the accusations of the two government witnesses, or to explain away in any way he saw fit the statements made by them, remained silent and neither explained nor denied these serious accusations which were the basis upon which this order of deportation rested. This silence on the part of the appellant is most significant in view of the fact that without explanation and without denial the testimony of the two government witnesses could and did result in an order that this appellant be deported from the United States, which deportation he now so strenuously opposes. This being a civil and not a criminal proceeding the Special Inquiry Officer had every right in taking the appellant's silence into consideration along with the uncontradicted evidence produced by the two government witnesses.

It is respectfully submitted that there is found in the testimony of these two witnesses ample substantial evidence of the appellant's voluntary membership in the Communist Party during 1937, 1938 and 1939. A situation of striking similarity occurred in the case of *Hamish Scott MacKay v. John P. Boyd, et al.*, 218 F. 2d 667. In that case the government witnesses at the administrative hearing testified as to the attendance of the petitioner at closed Communist Party meetings, his payment of dues, and his possession of a membership book. The only issue raised on the appeal to this Court was the sufficiency of the evidence, appellant asserting that the deportation order was not based on any substantial probative or reasonable evidence. This Court, in its per curiam opinion stated: "We find abundant evidence in the testimony of MacKay's wife and other witnesses to sustain the finding." 218 F. 2d 667.

Appellant also asserts under this Specification of Error that if he was a member of the Communist Party, his membership was so nominal as to render him non-deportable for that reason. Appellant cites *Galvan v. Press, supra*, for the proposition that the government must prove that an alien is more than a nominal member of the Party in order to deport him. The *Galvan* case stated that it was merely necessary for the alien to join the Communist Party voluntarily. Justice Frankfurter stated that it was the intention of Congress that the word "member" should have the same meaning in the 1950 Act as previously and that this intent precluded an interpretation limited to those who were fully cognizant of the party's advocacy of violence. The judicial

and administrative decisions prior to 1950 do not exempt aliens who join an organization unaware of its program and purposes. Citing *Kjar v. Doak*, 61 F. 2d 566; *Greco v. Haff*, 63 F. 2d 863.

Justice Frankfurter went on to state as follows:

“It must be concluded therefore that support or even demonstrated knowledge of the Communist Party’s advocacy of violence was not intended to be a pre-requisite to deportation. It is enough that the alien joined the party, aware that he was joining an organization known as the Communist Party, which operates as a distinct and active political organization and that he did so of his own free will.” (347 U.S. 522 at 528)

Applying this test, the Hearing Officer’s finding here, that appellant was a “member” of the Communist Party, is not in error for the testimony at the hearing was that the appellant attended closed meetings of the Communist Party, paid his dues at Communist Party headquarters, assisted in the circulation of a Communist Party newspaper and took an active part in the Communist Party meetings he attended. Under the test in the *Galvan* case, *supra*, this evidence furnishes an ample basis for the findings that the appellant was a “member” of the Communist Party within the meaning of the act.

In view of the foregoing, it is respectfully submitted that the finding that the appellant was a member of the Communist Party of the United States was based upon substantial evidence uncontradicted by the appellant or any witness called by him, and that his membership in the party was voluntary and conscious membership and not so accidental, artificial or nominal as to vitiate this valid deportation order.

SPECIFICATION OF ERROR NO. 3

Appellant contends that the Board of Immigration Appeals' denial of his application for suspension of deportation was so arbitrary and capricious as to constitute an abuse of discretion and that the court below erred in not so finding.

It is readily conceded that the cases cited on page 17 of appellant's brief announce the rule that the order of the Board is judicially reviewable. It is likewise conceded that if the order denying suspension constitutes an abuse of discretion, it should be set aside on review. Such is not the case here.

It will be remembered that this immigration proceeding was reopened for the sole purpose of allowing the appellant to petition for suspension of the deportation order; a hearing on the application for suspension was held, at which time the appellant testified in his own behalf.

Even the most cursory reading of the opinion of Louis C. Hafferman, Special Inquiry Officer, denying the suspension of this deportation order, will make apparent the fact that the denial was not capricious or arbitrary. Hafferman's opinion, which is part of the record before this court, makes it clear that he had doubt as to the credibility of the appellant when he testified at the hearing on his petition for suspension. The appellant's answers to many of the questions were evasive and Hafferman found that his demeanor was such that he was not to be believed. It is, of course, a fundamental

principle that the trier of fact is in the best possible position to observe and judge the credibility of the witness' appearing and giving oral testimony before him. Where the disbelief in the testimony of a witness is based upon observation of him, the courts are obliged to accept that finding. *N.L.R.B. v. Dinion Coil Co.*, 201 F. 2d 484 (2 Cir. 1952).

The transcript of the original deportation hearing in 1953, together with the proceedings at the hearing on the application for suspension, are before this court, together with the findings of the Special Inquiry Officer denying suspension. We believe that no useful purpose could be achieved by setting forth here portions of the testimony or quoting to any great length from the Inquiry Officer's findings; however, it is respectfully submitted that a review of the testimony, together with the findings, will lead this court to the conclusion that Haferman and the Board of Immigration Appeals have not abused its discretion and have not acted in an arbitrary and capricious manner.

As stated earlier, the third point contained in appellant's concise Statement of Points of Appellant on Appeal differs somewhat from the Specification of Error No. 3 discussed above and contained in appellant's brief at page 5. This third point will therefore be discussed briefly below.

POINT 3 OF APPELLANT ON APPEAL

Appellant states in his list of Points on Appeal that he was not afforded a fair hearing before the Immigration and Naturalization Service. Inasmuch as he did not discuss this point in his brief, it is impossible for the government to know wherein he contends that his various appearances and hearings before the Immigration Service were not conducted in a fair manner. Again, a review of the entire record in this case, it is submitted, will make immediately apparent that the appellant was given every opportunity to bring forth evidence to refute the charge that he had been a member of the Communist Party. At the original hearing, he was represented by competent counsel experienced in immigration matters. He was given every opportunity to give testimony in his own behalf relative to alleged membership in the Communist Party and he chose to remain silent on that point. Thereafter, he did not choose to petition for suspension of the deportation order until after the time for such petition had expired. When he did decide to petition for suspension, the Department of Justice allowed his case to be reopened to afford him that privilege and, again, at a hearing, he was represented by competent counsel and this time gave testimony in his own behalf.

At each point in the administrative proceedings, at each hearing, this appellant was given every opportunity to explain his alleged membership in the party and to bring forth witnesses on his own behalf to prove that he was not a member of that organization. At each point

in the administrative proceedings and at each hearing, he was represented by competent legal counsel, well-acquainted with the administrative practice before the Immigration and Naturalization Service. In view of these facts, the bare statement that the appellant was not afforded a fair hearing before this body is a hollow one, indeed, and not worthy of notice by this court. *Harisiades v. Shaughnessy, supra.*

CONCLUSION

Judgment of the District Court dismissing the amended petition for writ of habeas corpus and complaint for injunctive relief, discharging the writ of habeas corpus and remanding the appellant to the custody of the District Director of the Immigration and Naturalization Service for deportation, should be, in all things, affirmed. This appellant was found deportable after a fair hearing and under a constitutional statute. Further delay in the execution of this valid deportation order should not be tolerated.

Respectfully submitted,

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Attorneys for Appellees.

November, 1956.

United States
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Appellees.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Oregon*

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Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

**REPLY IN SUPPORT OF SPECIFICATION
OF ERROR NO. 1**

Appellant has fully stated his reasons why he believes the statute in question violates the Constitution of the United States. He has pressed the objection in the expectation that the Supreme Court's decisions in *Galvan v. Press*, 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737, and *Harisiades v. Shaughnessy*, 342 U.S. 580, 96 L. Ed.

586, 72 S. Ct. 512, will be overruled this term of the Court. Appellant does not, under such circumstances, wish to waive what he believes to be a valid objection to the statute.

REPLY IN SUPPORT OF SPECIFICATION OF ERROR NO. 2

The Government asks, in effect, for this Court to put blind faith in the judgment of the Inquiry Officer as to the credibility of the witnesses Wilmot and Knipe. But the Government's own Board of Immigration Appeals discounted Knipe's testimony and found that he had lied under oath. Thus the aura of infallibility with which the Government seeks to surround the Inquiry Officer is swept away by its own reviewing authority, and all that is left is the patently false testimony of Wilmot.

Upon this testimony the Government bases its decision that Appellant is deportable. It goes even so far as to "improve" Wilmot's testimony by careless summary. For instance, the Government's brief on pages 7 and 9 asserts that the newspaper "The Labor New Dealer" was a "Communist Party" newspaper. This is absolutely untrue; the fact is clear from the mouth of Wilmot himself that the "Labor New Dealer" was the organ of the Portland Industrial Union Council, part of the C. I. O. (Tr. 15, 27-31).

While the credibility of witnesses is ordinarily left to the judgment of the trier of fact, yet we cannot believe

that this Court will carry such a rule to the point where the harsh sanction of deportation and exile is supported only by the testimony of liars, drunkards, and hopelessly biased witnesses. There must be limits to the effort of the Government to purge from our midst aliens whose attitudes displease the sensibilities of Inquiry Officers.

Even granting the Government's view, *arguendo*, that Appellant was a member of the Communist Party, we think that a fair reading of the record discloses no evidence that such membership was held with knowledge by Appellant that the Communist Party was a "distinct and active political organization" as required by the Supreme Court in *Galvan v. Press*, 347 U.S. 522 at 528.

REPLY IN SUPPORT OF SPECIFICATION OF ERROR NO. 3

The Government in its brief refuses to discuss the objections lodged against the disposition of Appellant's application for suspension of deportation. It merely asserts that the record will disclose that there was no abuse of discretion in this regard.

We respectfully disagree, and we call to the Court's attention again the points made in Appellant's Opening brief, pp. 17-20. Moreover, we urge the Court to read the opinion of the Inquiry Officer, upon which the Government so heavily leans. No clearer evidence is possible than this document to show the bias and the determination of the Inquiry Officer to deport Appellant, regardless of the facts. Having no derogatory evi-

dence or even "confidential information," to base his opinion on, the Inquiry Officer indulges in *non sequiturs*, innuendo and distortions which make a mockery of the "hearing" on this issue.

For example, the Inquiry Officer emphasizes that after Appellant was found deportable, he turned for help to two organizations in the Portland area. This the Inquiry Officer finds objectionable, although he is unable to produce any evidence of disloyalty on the part of these groups except to say that one was "referred" to as a Communist front in a 1948 report by a California legislative committee. If the Inquiry Officer may take "judicial" notice of this report, we might also be excused for calling to this Court's attention the generally unreliable reputation of the legislative committee which produced the report.

The Appellant is clearly a person of good character who has lived a peaceful, constructive life in the United States with his wife and family. He served honorably in the armed forces of this country. There is no evidence of any disloyal act or idea of Appellant. The most that can be said is that during the depression he participated in a small way in various groups devoted to improving economic conditions among working people. Some of these groups may have contained Communists, but the record is clear that Appellant, far from being interested in politics, is and was rather ignorant of such matters and concerned only with "bread and butter" issues.

Under these circumstances, we think that the Government has gone too far in attempting to deport Ap-

pellant. Every decent instinct is outraged when a government goes back into men's lives nearly twenty years and seeks to break up a family and exile the breakwinner because of alleged associations in so distant a past. No single wrongful act is charged against Appellant. No evil thought has been shown to have ever passed through Appellant's mind. Yet we are treated to the spectacle of a government of a great and free democracy seeking to impose deportation on such a person. It is with more than usual feeling that we urge the judgment be reversed.

Respectfully submitted,

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United States
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Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

FILED

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United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,
Appellees.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon

To the Honorable Albert Lee Stephens, James Alger Fee and William J. Lindberg:

COMES NOW, appellant WILLIA NIUKKANEN, and respectfully petitions the above Court for a rehearing of his appeal in which an opinion affirming the judgment of the District Court was filed on February 8, 1957, for the following reasons and upon the following grounds:

I.

The Court erred in affirming the Judgment of the District Court in that it failed to consider the question of whether the Act of October 16, 1918, 40 Stat., 1012, as amended by Section 22 of the Internal Security Act of 1950, now Section 1251(a)(6)(c), Title 8, United States Code, is unconstitutional as a Bill of Attainder.

II.

The Court erred in finding that Petitioner was a member of the Communist Party in that it ignored the effect of the United States Supreme Court decision in *Mesarosh vs. United States*, 352 U. S. 1, 1 L. Ed. (2d) 1, 77 S. Ct. 1 (1956).

III.

The Court erred in failing to follow the United States Supreme Court's decision in *Galvan vs. Press*, 347 U. S. 522, 98 L. Ed. 911, 74 S. Ct. 727 (1954), as to the high court's definition of what constitutes nominal membership in the Communist Party.

IV.

The Court erred in not granting appellant suspension of deportation in that the Board of Immigration Appeals abused its discretion in relying upon evidence not material for determination of eligibility for suspension of deportation, as provided, Title 8, Sec. 1254 (a) (5), U. S. Code.

ARGUMENT

I.

Section 22 of the Internal Security Act of 1950 is an unconstitutional Bill of Attainder.

The Court upon oral argument gave notice to counsel that it would not consider any constitutional arguments raised in this case. The Court felt that it was foreclosed by the Supreme Court's opinions in *Galvan vs. Press*, *supra*, and *Harisiades vs. Shaughnessy*, 342 U. S. 580, 96 L. Ed. 586, 72 S. Ct. 512 (1951).

In neither of the above mentioned cases however did the Supreme Court reach the question of whether the section of the United States Code in question is an unconstitutional Bill of Attainder. One may search *Galvan* and *Harisiades* in vain for a mention in the court's opinions of any reference to Bill of Attainder. The petitioner here raises an undecided point in regard to the constitutionality of the statute under which the government seeks to deport him. We feel that the Court should give consideration to Petitioner's argument that the Act constitutes a Bill of Attainder.

We have called to the Court's attention the fact that there is at this time pending decision before the United States Supreme Court the case of *Rowoldt vs. Perfetto*, which is number 34 on the October docket of the United States Supreme Court. This case has been argued and in the course of the briefs submitted, the issue of Bill of Attainder was raised by the Petitioner and will probably be decided by the Supreme Court. We feel that this

Court should either reach that issue itself, or hold this case under advisement until such time as the United States Supreme Court has pronounced its judgment on this issue.

II.

The Court erred in finding that petitioner was a member of the Communist Party.

In affirming the District Court's finding that petitioner was a member of the Communist Party, the Court failed to take into account the recent decision in *Mesarosh vs. The United States*, supra. In that case the defendant was alleged to have conspired to violate the Smith Act, and at the trial of the case a government witness, Mazzei, provided important testimony upon which basis defendant was convicted. After the case had reached The United States Supreme Court the government filed notice that the witness Mazzei had lied in other similar proceedings and that his testimony had been discredited. The government sought to have the case remanded to the trial court for further proceedings but the defendant moved the court for a new trial. Chief Justice Warren upheld the defendants' motion for a new trial upon the basis that the conviction had been at least in part obtained by the testimony of a discredited witness. The Court said:

"The dignity of the United States government will not permit the conviction of any person on tainted testimony."

We believe that the policy laid down in the *Mesarosh* case applies as much to this deportation case as it

did to the criminal prosecution. Certainly the dignity of the United States is as much at stake in this proceeding as in an out and out criminal case.

Here the witness Lee Knipe is an admitted perjurer who lied about his criminal background in this proceeding and the Board of Immigration Appeals itself stated that his testimony was thus discredited.

We think that the resources of the United States in the prosecution of a deportation case such as this are great enough and the rights of aliens substantial enough so that more reliable and more respectable testimony than that offered in this case should be required of the government before a man 49 years old can be deported to a Finland which he has not seen since before he was one year old.

III.

The Court erred in failing to follow the United States Supreme Court's definition of "nominal membership" in the Communist Party.

As we pointed out in our opening brief on page 15, the Supreme Court in *Galvan vs. Press* stated that an alien member of the Communist Party must have been aware that he was joining an organization which operates as a distinct and active political organization before he can be deported. We think that this states in simple and positive terms that the government must bear the burden of proving that appellant knew that the Communist Party was a political organization. We think that the record is absolutely devoid of such proof.

IV.

The Court erred in not granting appellant suspension of deportation.

The statute covering suspension of deportation states that the government may recommend suspension when an otherwise deportable alien has shown that he has good moral character during ten years since the commission of the act constituting grounds for deportation, and hardship. The application for suspension of deportation was not denied because of any failure to meet the above specifications. Rather the Board of Immigration Appeals did not feel that appellant was justified in failing to answer certain questions and it did not approve of appellant's association with certain groups in Portland whose purpose is the protection of aliens subject to deportation. The record is devoid of evidence that these groups are in any way affiliated with or are fronts for Communist Party activities. On the contrary, the Board of Immigration Appeals recognizes the lack of such evidence but glosses it over. The government admits that this is a case of extreme hardship upon the family of the appellant. It admits that appellant is a person of good moral character. But it still refuses to grant him suspension in spite of all of the equities involved. We believe that this constitutes an abuse of discretion on the part of the government and think that the Court should insist that the government be scrupulously fair in exercising its discretion in cases of this sort.

For the foregoing reasons we respectfully urge the Court to grant a rehearing of this case and we are con-

vinced that on the basis of law and justice appellant should not be deported from this country.

Respectfully submitted,

NELS PETESRON,

Peterson, Pozzi & Lent,
901 Loyalty Building,
Portland, Oregon,

GERALD H. ROBINSON,

1006 Failing Building,
Portland, Oregon,

Attorneys for appellant.

STATE OF OREGON)
) ss.
County of Multnomah)

I, Nels Peterson, do certify that I am one of the attorneys for appellant in the above case; that the foregoing petition for rehearing is in my judgment well founded and that it is not interposed for delay.

Nels Peterson



No. 15078

United States
Court of Appeals
for the Ninth Circuit

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

Transcript of Record

FILE

JUL -6 1956

Appeal from the District Court of Guam
Territory of Guam. PAUL P. O'BRIEN, CLERK

No. 15078

United States
Court of Appeals
for the Ninth Circuit

CRISTOBAL C. HINES,

Appellant,

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Transcript of Record

Appeal from the District Court of Guam
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

E. R. CRAIN,

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Agana, Guam;

THOMAS J. JENKINS,

625 Market St.,
San Francisco, Calif.,

For the Appellant.

TURNER & STEVENS,

Aflague Bldg.,
Agana, Guam;

SPIEGEL, TURNER & STEVENS,

613 Wilshire Blvd.,
Santa Monica, Calif.,

For the Appellee.

District Court of Guam, Territory of Guam

Civil No. 27-55

JOAQUIN A. PEREZ,

Plaintiff,

vs.

CRISTOBAL HINES,

Defendant.

COMPLAINT TO RECOVER ON CONTRACT

Comes now the plaintiff and for cause of action against defendant alleges:

1. Jurisdiction over this action is vested in this Court by the Organic Act of Guam and Public Law 17, First Guam Legislature, as amended. The amount in controversy exceeds the sum of Two Thousand Dollars.

2. On the 29th day of September, 1952, plaintiff and defendant entered into a written agreement whereby plaintiff sold, transferred, and delivered to defendant twenty-five (25) shares of capital stock of Island Service Company, Inc., a Guam corporation, at the actual value of such shares to be as determined in accordance with the provisions of said contract of September 29, 1952, a copy of which is attached hereto marked Exhibit "A" and incorporated herein by reference.

3. Pursuant to the provisions of said contract, Ireneo Viray and Stanley Kaneshiro conducted an audit of the books and records of said Island Serv-

ice Company, Inc., from the inception thereof to and including October 1, 1952, and Sherwood Wiseman, pursuant to the provisions of said contract, reconciled the differences arising from said audit by Viray and Kaneshiro, and pursuant to the provisions of said contract determined that the actual value of the capital shares of Island Service Company, Inc., was \$163,070.31, of which \$60,000.00 constituted paid-in capital and \$103,070.31 constituted earned surplus.

4. The actual value of plaintiff's shares of stock pursuant to said contract of September 29, 1952, is \$40,767.57.

5. Plaintiff has demanded of defendant the payment of the purchase price of said shares, but defendant has refused and failed and still refuses and fails to pay said purchase price, to defendant's damage in the sum of \$40,767.57.

Wherefore, plaintiff demands judgment against defendant in the sum of \$40,767.57, for costs of suit, and for such other and further relief as the Court may deem just.

Dated: Agana, Guam, April 19, 1955.

TURNER & STEVENS,

By /s/ RUSSELL L. STEVENS,
Attorney for Plaintiff.

EXHIBIT "A"

Agreement

This agreement, made and entered into this 29th day of September, 1952, by and between Cristobal C. Hines, Party of the First Part, hereinafter referred to as Hines, and Joaquin A. Perez, Party of the Second Part, hereinafter referred to as Perez;

Witnesseth:

Whereas, Perez is the owner of twenty-five (25) shares of stock of Island Service Company, Inc., a Guam corporation, which stock has a par value of Six Hundred Dollars (\$600.00) per share; and

Whereas, Perez has agreed to sell said shares to Hines as hereinafter provided;

Now, Therefore, in consideration of the premises and the covenants and conditions hereinafter contained, it is agreed by and between the parties hereto as follows:

1. Perez covenants and agrees to sell and does hereby sell and transfer the said shares of stock to Hines.

2. Hines covenants and agrees to pay for said shares the "actual value" thereof as of October 1, 1952.

3. The term "actual value" as used herein shall be determined as follows:

(a) Hines hereby designates Ireneo Viray, and Perez hereby designates Stanley Kaneshiro, which

two individuals will jointly audit the books and records of Island Service Company, Inc., from the inception thereof, to and including October 1, 1952. After said joint audit has been completed, Robert Wiseman shall review said audit and shall attempt to reconcile any differences that may have arisen therein. After such review the results of said audit shall be presented to Crain and Phelan and Lyle H. Turner, the attorneys for the respective parties. In the event any difference of opinion should result between said counsel as a result of said audit, either party hereto shall have the right to take said difference of opinion into any Court with jurisdiction thereof in order that said difference may be resolved. Any such recourse to Court will be limited to resolving any difference that the parties hereto have been unable to resolve.

3. (b) Accounts receivable shall be evaluated in accordance with standard accounting methods as said accountants and auditor may agree upon by majority vote. In reaching said determination said accountants shall use a standard accountants' handbook accepted by the American Society of Accountants, or a like national society.

(c) The stock in trade shall be listed at the actual cost to the corporation delivered in the warehouse of the corporation.

(d) Fixtures attached to the realty, excluding mechanical contrivances, shall be valued at cost to the corporation, depreciated to October 1, 1952, which depreciation shall be over the period of the

lease of the corporation of the premises upon which the corporation is located, or the period of amortization allowed by the income tax regulations of the Federal Government, as modified for the Territory of Guam, whichever period shall be shorter. In the event of any dispute or difference of opinion regarding the period of amortization allowed under local income tax regulations, the determination of the tax commissioner of the Government of Guam will be accepted.

(e) All other fixtures, including rolling stock, mechanical fixtures attached to realty, etc., shall be valued at their actual value as of October 1, 1952. For the purpose of determining said actual value, Perez shall select an appraiser, and does hereby select Jack Lathrop, subject to the right to substitute another appraiser in the event said Jack Lathrop does not agree to act as appraiser or is otherwise unavailable, and Hines shall designate an appraiser on or before Friday, October 3, 1952. In the event said two appraisers are unable to agree upon the value of any asset, as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final.

(f) All other assets and liabilities shall be determined by standard accounting methods as set forth in *The Accountants' Handbook*, or some other standard accounting manual recognized and approved by the American Society of Accountants, or some other like national society.

3. (g) There shall be included in determining the "actual value" of the corporation the capital invested in the business, which is agreed to have been Sixty Thousand Dollars (\$60,000.00) at the inception of the corporation.

4. After said "actual value" of the corporation has been determined, Hines shall pay to Perez, within thirty (30) days after the execution of this agreement, or within fifteen (15) days after said determination of the "actual value" of said corporation, whichever shall be later, twenty-five per cent (25%) of said "actual value," payment to be made as follows: the sum of Fifteen Thousand Dollars (\$15,000.00), providing said twenty-five per cent (25%) of the "actual value" equals or exceeds the sum of Fifteen Thousand Dollars (\$15,000.00); provided, however, that if said twenty-five per cent (25%) is less than Fifteen Thousand Dollars (\$15,000.00), Hines shall pay the amount of said twenty-five per cent (25%). In the event that said twenty-five per cent (25%) exceeds the sum of Fifteen Thousand Dollars (\$15,000.00), the amount in excess of Fifteen Thousand Dollars (\$15,000.00) shall be paid as follows: in twelve (12) equal installments, commencing ninety (90) days after said initial payment of Fifteen Thousand Dollars (\$15,000.00) is due and payable.

5. Perez shall endorse in blank and deliver to Hines the share certificate evidencing the fact that he is the owner of the foregoing shares of stock, when the following has been accomplished: the

Board of Directors and shareholders of the corporation have ratified an agreement between the corporation and Perez, which agreement has been drawn up of even date herewith and signed by Perez, it being understood and agreed that said Board of Directors and shareholders shall meet on September 30, 1952, for the purpose of ratifying said agreement.

In Witness Whereof, the parties hereto have set their hands in Agana, Guam, on the day and year first above written.

/s/ CRISTOBAL C. HINES,

/s/ JOAQUIN A. PEREZ.

In the presence of:

/s/ VIRGINIA A. CRAIN.

[Endorsed]: Filed April 19, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To Joaquin A. Perez, and Spiegel, Turner & Stevens, his attorneys:

Please take notice that the defendant will move this Court at the Guam Congress Building, Agana, Guam, on Friday, the 10th day of June, 1955, at 9:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing

the above-captioned case for failure to state a claim upon which relief can be granted.

/s/ E. R. CRAIN,

Attorney for Defendant.

[Endorsed]: Filed May 31, 1955.

District Court of Guam, Territory of Guam
Civil No. 27-55

JOAQUIN A. PEREZ, Plaintiff,

vs.

CRISTOBAL C. HINES, Defendant.

ANSWER

Comes now the defendant and answers the complaint on file herein as follows:

First Defense

The complaint on file herein fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant denies each and every allegation contained in said complaint.

Wherefore, defendant prays that plaintiff's complaint be dismissed and that defendant have his costs expended herein.

/s/ E. R. CRAIN,

Attorney for Defendant.

[Endorsed]: Filed July 18, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

I. Pleadings:

The plaintiff filed his complaint under date of April 19, 1955, in which he alleged that under date of September 29, 1952, plaintiff and defendant entered into a written contract for the sale of 25 shares of capital stock of the Island Service Company, Inc., a Guam corporation. The value of such shares was to be determined in accordance with the terms of the contract. The plaintiff alleges that audits were made of the corporate assets in accordance with the contract and that the value of the 25 shares is \$40,767.57, for which judgment is prayed.

The defendant answered and for a first defense alleged that the complaint did not state a cause of action, and for a second defense the defendant denied each and every allegation contained in the complaint.

II. Conference:

At the pretrial conference plaintiff contended that in accordance with the terms of the written agreement audits had been made and reconciled; that appraisals had been made of equipment; and that the book value of the stock in question is the amount alleged.

The defendant contended that the terms of the agreement had not been complied with and that

there was no satisfactory determination of the book value of the stock.

III. Witnesses for Plaintiff:

1. Spencer M. Forkner will testify as to his appraisal of equipment, the value of which is in dispute.

2. Walker Lathrop will testify by deposition as to his appraisal of the value of equipment in dispute and as to the joint selection of James Norris as a third appraiser.

3. James Norris will testify as to his appraisal of the equipment in dispute.

4. Stanley Kaneshiro will testify as to his audit of corporate assets as of October 1, 1952.

5. Ireneo Viray will testify as to his audit of corporate assets as of the same date.

6. Sherwood Wiseman will testify as to his reconciliation of differences appearing in the audits.

IV. Witnesses for Defendant:

1. Henry Schwendinger will testify that he was employed to make an appraisal of the equipment and the results of his appraisal. He will testify by deposition.

2. Ireneo Viray will testify as to his audit.

3. The defendant will testify as to the methods of making the audit and the appraisals.

4. Spencer M. Forkner will testify as to the methods of appraisal.

V. Stipulations:

The parties stipulated as follows:

1. The contract attached to the complaint is a true and correct copy of the original contract.

2. The parties have been unable to reconcile their differences and the entire contract is in dispute.

3. Either party may call additional witnesses by giving the other party notice five days in advance of trial of the names of such witnesses and the testimony to be given.

4. The parties stipulate that the action is to be tried to the Court without a jury.

VI. Order: It is Herewith Ordered:

1. The stipulations entered into by the parties are approved.

2. This action is set for trial October 17, 1955, at 9:30 a.m.

Dated and entered this 30th day of August, A.D. 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved:

/s/ LYLE H. TURNER,
Attorney for Plaintiff.

/s/ E. R. CRAIN,
Attorney for Defendant.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Cristobal C. Hines, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 26th day of October, 1955.

Dated this 9th day of November, 1955.

/s/ E. R. CRAIN,
Attorney for Appellant.

[Endorsed]: Filed November 9, 1955.

[Title of District Court and Cause.]

MOTION FOR SETTLEMENT OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Counsel for Plaintiff and Defendant having been unable to agree to the form of the Findings of Fact,

Conclusions of Law and Judgment to be filed and entered in the above-entitled cause, Plaintiff moves the Court to settle the Findings of Fact, Conclusions of Law and Judgment to be filed and entered herein.

Dated: November 23, 1955.

TURNER & STEVENS,
Attorneys for Plaintiff.

By /s/ LYLE H. TURNER.

[Endorsed]: Filed November 23, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This action having been tried by this Court without a jury, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. On the 29th day of September, 1952, plaintiff and defendant entered into a written agreement whereby plaintiff sold to defendant twenty-five (25) shares of capital stock of Island Service Company, Inc., a Guam corporation, hereinafter referred to as corporation, said stock having a par value of Six Hundred Dollars (\$600) per share, the share so sold constituting twenty-five per cent (25%) of the subscribed shares of said corporation. Pursuant

to said contract, plaintiff endorsed his share certificate representing his twenty-five (25) shares in blank and delivered the same to the defendant, through Finton J. Phelan, Jr., the then attorney for defendant.

2. Said agreement of September 29, 1952, provided that the plaintiff should receive from defendant the "actual value" of such shares as of October 1, 1952, the said value to be determined by a joint audit of the books and records of corporation from the inception thereof, November 9, 1950, to and including October 1, 1952, and for the purpose of making such the plaintiff designated Stanley Kaneshiro as his representative and the defendant designated Ireneo Viray, as his representative.

3. After the completion of the joint audit, Sherwood Wiseman was designated by the parties as the person to review the joint audit and to attempt to reconcile any differences that might have arisen between the auditors. After such review the result of the audit was to be presented to Crain & Phelan, attorneys for defendant, and Lyle H. Turner, attorney for plaintiff. In the event any differences of opinion should result between counsel as a result of said audit, either party would have the right to take said difference of opinion to any court having jurisdiction to resolve the differences. Subsequent to the execution of the agreement the law firm of Crain & Phelan was dissolved and thereafter E. R. Crain acted solely as counsel for defendant.

4. In determining the "actual value" of plaintiff's shares, accounts receivable were to be evaluated in accordance with standard accounting methods as the accountants and auditor might agree upon by majority vote; the stock in trade was to be listed at actual cost to the corporation, delivered to the warehouse of the corporation; fixtures attached to the realty, excluding mechanical contrivances, were to be valued at cost to the corporation, depreciated to October 1, 1952, the depreciation to be over the period of the lease of the corporation of the premises where corporation was located, or the period of amortization allowed by the Federal income tax regulations, as modified for the Territory of Guam, whichever period was shorter. In the event of any dispute or differences of opinion regarding the period of amortization allowed under local income tax regulations, the determination of the tax commissioner of the Government of Guam, was to be accepted; all other fixtures, including rolling stock, mechanical fixtures attached to the realty, etc., were to be valued at their actual value as of October 1, 1952, to be determined by two appraisers, Walter Lathrop being the appraiser designated by the plaintiff and the defendant designating an appraiser by October 1, 1952. The defendant first designated Peter Sgro, and subsequently substituted Spencer M. Forkner. If the two appraisers were unable to agree upon the value of any of such asset, they were to select a third appraiser whose decision on the value of said assets was to be final; all other assets and liabilities were to be

determined by standard accounting methods as set forth in *The Accountants' Handbook*, or some other standard accounting manual recognized and approved by the American Society of Accountants, or some other like national society; in determining the actual value of the corporation, it was agreed that the capital investment was Sixty Thousand Dollars (\$60,000) at the inception of the corporation.

5. Said agreement provided that all fixtures, other than mechanical fixtures attached to the realty, were to be valued at their actual value as determined by two appraisers, and defendant selected Spencer M. Forkner and plaintiff selected Walter Lathrop, as their respective appraisers. In the event said appraisers were unable to agree upon the value of any assets as of October, 1952, the contract provided the two appraisers were to select a third appraiser whose decision on the value of the assets to be appraised was to be final. Spencer M. Forkner appraised the value of said assets to be \$22,349.00 and Walter Lathrop appraised the value of said assets as \$41,036.00; thereafter said two appraisers appointed James Norris as the third appraiser and he appraised the value of said assets as \$34,391.00 and the Court finds the value of said appraised assets to be \$34,391.00 in accordance with the appraisal of said James Norris.

6. Ireneo Viray and Stanley Kaneshiro audited the books and records of the corporation and Viray determined the actual value of the corporation to be Seventy-Nine Thousand Six Hundred One Dol-

lars and Ninety-One Cents (\$79,601.91) and Kaneshiro determined the actual value to be One Hundred Twenty-One Thousand Two Hundred Twenty-Eight Dollars and Sixty-Seven Cents (\$121,228.67).

After discussions with Sherwood Wiseman, the two accountants agreed to certain adjustments to their computations to be made by Wiseman, and as a result of said adjustments, Wiseman determined the actual value of the corporate shares as determined by Viray to be One Hundred Fifty-Five Thousand Six Hundred Twenty-Five Dollars and Ninety-Five Cents (\$155,625.95) and by Kaneshiro to be One Hundred Fifty-Two Thousand Eight Hundred Thirty-Three Dollars and Two Cents (\$152,833.02).

7. Counsel for plaintiff and defendant agreed that the respective counsel for the two parties were unable to reconcile the differences upon the actual value of the corporation and that the entire contract was in dispute.

8. The Court finds the following to be the assets and liabilities of corporation as of October 1, 1952:

Cash on hand and in bank	\$ 20,047.40
Notes receivable	850.00
Accounts receivable, after deducting bad debts	53,548.74
Inventory—merchandise	48,506.65
Inventory—new cars	11,489.33
<hr/>	
Total current assets	\$134,442.12

Fixed Assets:

Buildings	\$ 21,616.59
Office equipment	188.75
Furniture and fixtures	736.58
Heavy equipment	34,391.00
<hr/>	
Total fixed assets	\$ 56,932.92
Merchandise in transit	\$ 34,489.64

Other:

Prepaid insurance ..\$	728.44
Prepaid expenses ..	545.28
Deposits	1,700.00
Total other assets	\$ 2,973.72
<hr/>	
Total assets	<u>\$228,838.40</u>

Liabilities:

Current

Notes payable	\$ 13,659.15
Drafts payable	41,369.67
Accounts payable	4,697.11
Accrued items	2,228.17
<hr/>	
Total current liabilities ...	\$ 61,954.10
Reserve for income taxes	10,903.79
Capital stock	60,000.00
Earned surplus	95,980.51

9. Under the said agreement of September 29, 1952, plaintiff is entitled to one-fourth ($\frac{1}{4}$) of the said earned surplus, or \$23,995.12 and one-fourth ($\frac{1}{4}$) of the paid in capital of \$60,000.00 or \$15,-

000.00, making a total amount of \$38,995.12, which the Court finds to be the purchase price of plaintiff's stock under the said agreement of September 29, 1952.

10. The Court finds that it is the intent of the parties under paragraph 4 of the agreement of September 29, 1952, that if the value of the shares of corporation exceeded the par value of said shares, the plaintiff was to pay to defendant \$15,000.00 of the purchase price, within fifteen (15) days after said purchase price was determined, and the balance in twelve (12) equal monthly installments, commencing one hundred and five days after the date of the determination of the said purchase price.

Conclusions of Law

1. The Court has jurisdiction over this action.

2. Plaintiff is entitled to judgment as against defendant in the amount of \$38,995.12 to be paid \$15,000.00 on or before November 10, 1955, and the balance of \$23,995.12 in twelve (12) equal monthly installments commencing February 8, 1956, with interest at the rate of six per cent (6%) per annum on any amount not paid when due, with plaintiff to have his costs.

Let judgment be entered accordingly.

Dated: November 14, 1955.

/s/ PAUL D. SHRIVER,

Judge of the District Court.

Approved as to form:

TURNER & STEVENS,

By /s/ LYLE H. TURNER,
Attorney for Plaintiff.

E. R. CRAIN,

/s/ E. R. CRAIN,
Attorney for Defendant.

Entered in Civil Docket nunc pro tunc as of November 14, 1955, by direction of Court on oral agreement of counsel.

/s/ ROLAND A. GILLETTE,
Clerk.

[Endorsed]: Filed December 16, 1955.

District Court of Guam, Territory of Guam
Civil Action No. 27-55

JOAQUIN A. PEREZ, Plaintiff,

vs.

CRISTOBAL HINES, Defendant.

JUDGMENT

This cause came on for trial before the Court without a jury, on the 24th day of October, 1955, and the issues having been tried and the Court having directed that plaintiff recover from defendant the sum of \$38,995.12 to be paid \$15,000.00 on or before November 10, 1955, and the balance of \$23,-

995.12 in twelve (12) equal monthly installments commencing February 8, 1956, and plaintiff's costs of action,

It Is Hereby:

Ordered, Adjudged and Decreed that plaintiff recover from defendant the sum of \$38,995.12 to be paid \$15,000.00 on or before November 10, 1955, and the balance of \$23,995.12 in twelve (12) monthly installments commencing February 8, 1956, with interest at the rate of six per cent (6%) per annum on any amount not paid when due, with plaintiff to have his costs of action. 1/13/56 Costs taxed in sum of \$645.23.

Dated: November 14, 1955.

/s/ PAUL D. SHRIVER,
Judge.

Approved as to form:

TURNER & STEVENS,
By /s/ LYLE H. TURNER,
/s/ E. R. CRAIN.

Entered in Civil Docket nunc pro tunc as of November 14, 1955, by direction of Court on oral agreement of counsel.

By /s/ ROLAND A. GILLETTE,
Clerk.

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Cristobal C. Hines, Defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of December, 1955.

Dated this 3rd day of January, 1956.

/s/ E. R. CRAIN,
Attorney for Appellant.

[Endorsed]: Filed January 3, 1956.

[Copy]

MINUTES

Civ/27/55 Joaquin A. Perez vs. Cristobal C. Hines
1955

5/31—Notice of Motion to Dismiss having been filed this date, Ordered that the hearing on the said motion be set for Friday, June 10, 1955, at 9:30 a.m., as set forth in the notice.

6/10—Hearing on Motion:

Plaintiff appears by Russell L. Stevens, his attorney. Defendant appears by E. R. Crain, his attorney. Having heard the arguments of the attorneys for the respective parties, the

Court denies the motion to dismiss the Complaint and gives the attorney for the defendant twenty (20) days to answer.

7/20—Issues having been joined, Ordered cause placed on the calendar for hearing on Friday, August 5, 1955, at 9:30 a.m. for resetting for Pretrial Conference.

8/5 —Hearing for Resetting:

Plaintiff appears by Russell L. Stevens, his attorney. E. R. Crain, attorney for defendant, not present. Having heard the attorney for the plaintiff, Ordered cause placed on calendar for Pretrial Conference on Tuesday, August 30, 1955, at 9:30 a.m.

8/30—Pretrial Conference:

Plaintiff appears by Lyle H. Turner, his attorney. Defendant appears by E. R. Crain, his attorney. Action has been placed in the calendar for trial on Monday, October 17, 1955, at 9:30 a.m., as set forth in the Pretrial Order filed herein.

10/14—By oral agreement between the attorneys for the respective parties, Ordered that that trial be postponed until Monday, October 24, 1955, at 9:30 a.m.

10/24—Trial:

Plaintiff appears in person and with Lyle H. Turner, his attorney. Defendant appears

in person and with E. R. Crain, his attorney. Thereupon comes the evidence on behalf of the plaintiff and certain documents marked Plaintiff Exhibits 1, 2, 3, 4, 5, 7, 8 and 9 are offered in evidence, and are accepted without objection and filed. During cross-examination, a certain document marked Defendant Exhibit A is offered in evidence, and is accepted without objection and filed. Counsel stipulate that copy to be made of Section 3 of a Recapitulation of Accounts Receivable, which is to be introduced as Defendant Exhibit B. Certain document is marked Plaintiff Exhibit 6 for identification only. Counsel stipulate that copy of deposition of Lathrop is introduced in evidence subject to objection by counsel for the defendant after he has read it and that the original when received is to be substituted therefor. Document attached to the deposition is to be replaced by the original when it is received. Taking of evidence continued until the hour of 4:50 o'clock p.m. when the Court recessed until the following day, Tuesday, October 25, 1955, at 9:30 a.m.

10/24—Trial Resumed:

All parties present as heretofore. Taking of evidence on behalf of the plaintiff continued and at the conclusion of which the plaintiff rests. Defendant through his attorney moves

to dismiss the complaint. Motion is denied. Counsel stipulate on the appraisals for the equipment as follows:

By Forkner, \$22,300.00.

By Lathrop, \$41,036.00.

By Norris, \$34,391.00.

Thereupon comes the evidence on behalf of the defendant and during cross-examination a certain document marked Plaintiff Exhibit 10 is offered in evidence and is accepted without objection and filed. By stipulation between counsel, the deposition of Schwendinger is introduced and accepted in evidence and that the plaintiff reserves the rights to relevancies. It is further stipulated that the deposition be filed in order not to read it into the records. At the conclusion of the evidence, the defense rests.

Ordered that the case be continued until Wednesday, October 26, 1955, at 9:30 a.m.

10/26—Oral Opinion and Judgment:

All parties present as heretofore. Court states his oral opinion. Court finds issues joined in favor of the plaintiff and against the defendant. Judgment will therefore be entered in favor of the plaintiff and against the defendant in the sum of Thirty-eight Thousand and Nine Hundred Ninety-five Dollars and Twelve Cents (\$38,995.12).

Judgment will be entered in accordance with paragraph 4 of the agreement on the basis of payment of Fifteen Thousand Dollars (\$15,000.00) within fifteen (15) days from today and the amount of Twenty-three Thousand Nine Hundred Ninety-five Dollars and Twelve Cents (\$23,995.12) is then to be paid in twelve (12) equal monthly installments ninety (90) days after the Fifteen Thousand Dollars (\$15,000.00) is paid. Plaintiff will prepare Findings of Fact, Conclusions of Law and settle with the defendant in ten (10) days, and will also prepare satisfactory judgment.

The below-named persons, having been duly sworn, testified during the course of the trial, as follows:

For the Plaintiff:

1. Joaquin Arriola Perez.
2. Stanley K. Kaneshiro.
3. Ireneo S. Viray.
4. Sherwood Wiseman.
5. Spencer M. Forkner.
6. James Norris.

For the Defendant:

1. E. R. Crain.
2. Cristobal C. Hines.

For the Plaintiff (In Rebuttal):

1. Lyle H. Turner.

11/23—Motion for Settlement of Findings of Fact, Conclusions of Law and Judgment having been filed this date, Ordered that the case be placed in the calendar for hearing on the said motion Friday, December 2, 1955, at 9:30 a.m.

12/2 —Hearing on Motion:

Plaintiff appears by Lyle H. Turner, his attorney. Defendant appears by E. R. Crain, his attorney. Having heard the attorneys for the respective parties, Ordered that the case be set over to Friday, December 9, 1955, at 10:30 a.m., for conference in Judge's Chambers.

1956

1/16—Notice of Motion for a review of action of the clerk in taxing costs herein, etc., having been filed this date, Ordered that hearing on the said motion be set for Friday, January 27, 1956, at 9:30 a.m.

1/27—Hearing on Taxing of Costs:

Plaintiff appears by Russell L. Stevens, his attorney. Defendant appears by E. R. Crain, his attorney. Having heard from the attorneys and after reviewing the costs as set forth, Ordered that costs be allowed as heretofore taxed by the Clerk.

Attest: A True Copy.

District Court of Guam, Territory of Guam
Civil Case No. 27-55

JOAQUIN A. PEREZ, Plaintiff,

vs.

CRISTOBAL C. HINES, Defendant.

Before: The Honorable Paul D. Shriver, Judge

TRIAL

TRANSCRIPT OF PROCEEDINGS

October 24, 1955

October 25, 1955

October 26, 1955

Agana, Guam

Appearances:

For the Plaintiff:

LYLE H. TURNER,
TURNER & STEVENS,
Attorneys at Law,
Agana, Guam.

For the Defendant:

E. R. CRAIN,
Attorney at Law,
Agana, Guam.

Monday, October 24, 1955—9:30 A.M.

The Court: First order of business?

The Clerk: Civil matter No. 27-55, Joaquin A. Perez vs. Cristobal C. Hines, coming on for trial.

The Court: Plaintiff ready?

Mr. Turner: Ready, your Honor.

The Court: Defendant ready?

Mr. Crain: Ready, your Honor.

Mr. Turner: If you Honor please, in regard to the deposition of Walter Lathrop I have received my copy but I understand the Court's copy has not come in and Mr. Crain has not come in.

Mr. Crain: I don't need my copy.

The Clerk: I asked Si to check at the post office to make sure it was received, but they have not received it.

The Court: It has not been received here. Are counsel in a position to stipulate that the copy may be introduced as the original.

Mr. Crain: The copy we can use for the time being.

The Court: Very well.

Mr. Turner: We will call Mr. Joaquin A. Perez, the plaintiff, as the first witness.

MR. JOAQUIN A. PEREZ

the plaintiff called as a witness in his own behalf,
was duly sworn and testified as follows: [2*]

Direct Examination

By Mr. Turner:

Q. Will you kindly state your full name and address?

A. Joaquin Arriola Perez; resident, Tumon Bay, west end.

Q. What is your occupation?

A. Businessman.

Q. Are you familiar with the Guam corporation known as Island Service Company, Inc.?

A. I am.

Q. Have you at any time been a shareholder in that corporation? A. Yes.

Q. Over what period?

A. From November 1, 1949, to on or about 30 September, 1952.

Q. During the time you were a shareholder in that corporation do you remember the number of capital shares that you held? A. \$15,000.

Q. Computed at par value?

A. The par value of my shares was \$15,000.

Q. Do you remember what the par value per share was?

A. Will you repeat that question, please?

Q. Do you remember what the par value per share was in Island Service Company, Inc.?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Joaquin A. Perez.)

A. What was each share worth? [3]

Q. If you don't remember, say so.

A. I don't remember.

Q. I see. Kindly mark that for identification.

(The clerk complied with the request.)

Q. I show you a two-page document, typewritten and marked Plaintiff's Exhibit 1 for identification and ask you if you recognize it or can identify it? A. Yes.

Q. What is it?

A. This is the articles of incorporation of Island Service Company, Inc.

The Court: I just direct counsel's attention to the fact that under the stipulation, the contract attached to the complaint is a true and correct copy of the original contract and that contract recites the par value. It was \$600 a share.

Mr. Turner: Yes, I wanted to get to it. I was just leading up with some other questions that may have some value, your Honor.

Mr. Crain: I have no objection.

Mr. Turner: I offer this in evidence as Plaintiff's Exhibit 1.

The Court: Very well, it may be received without objection.

Q. (By Mr. Turner): Did you pay to the corporation a consideration for your shares? [4]

A. Yes, I did.

Q. Did you subsequently sell your shares in the corporation? A. I did.

(Testimony of Joaquin A. Perez.)

Mr. Turner: May the record show that whenever I refer to "the corporation" I am referring to Island Service Company, Inc.

Q. (By Mr. Turner): When?

A. October 1, 1952.

Q. To whom did you sell your shares?

A. Cristobal C. Hines.

Q. Was that sale pursuant to any agreement?

A. Yes, to the best of my knowledge.

Q. Were you present at the time the written agreement was drawn up and executed?

A. Yes.

Q. Where was the agreement drafted and executed?

A. In the office of E. R. Crain and Phelan, attorneys at law.

Q. Who was present at the time of the drafting and execution of the agreement?

A. If I remember correctly Attorney Turner, Attorney Phelan, Mrs. Crain, acting as the stenographer, Cristobal Hines, Arturo Hines, Tomas Flores, myself.

Q. Did you state whether or not Mrs. Phelan was present? A. She was present. [5]

Q. During that drafting was Mr. Phelan acting as attorney for Mr. Hines?

A. Yes, as I understood it.

Q. And were you represented by counsel?

A. Yes.

(Testimony of Joaquin A. Perez.)

Q. Were your shares of stock in Island Service Company, Inc., evidenced by one share certificate or more than one share certificate?

A. If I remember correctly this certificate was prepared, I presume, by the office of E. R. Crain and Phelan and was signed over—the certificate was signed over to Hines.

Q. When was that?

A. After the signing of the agreement.

Q. Do you remember the date that you indorsed the certificate and transferred it over to Mr. Hines?

A. On or about——

The Court: Hadn't we better get an answer to your question before? Your question was, were the shares of stock represented by one certificate or more than one?

Mr. Turner: I will reask that question.

A. One certificate.

Q. (By Mr. Turner): One certificate. Do you understand that prior to the sale of this stock and this agreement no share certificate had ever been issued to you by the corporation?

A. That is correct. [6]

Q. And the share certificate which you have testified you indorsed and delivered over was prepared at the time of the agreement, to the best of your knowledge?

A. It was there in the office. I can't very well say it was at that very moment when it was prepared.

(Testimony of Joaquin A. Perez.)

Q. But you had not seen it prior to the time you signed and indorsed it over? A. No.

Q. Have you ever received any payment from Mr. Cristobal C. Hines for the shares of stock in Island Service Company which you have testified you indorsed in blank and turned over to Mr. Hines? A. No.

Mr. Turner: Your witness.

Cross-Examination

By Mr. Crain:

Q. Mr. Perez, you testified that you paid into the corporation the full consideration for your shares of stock. Was that in cash? A. No.

Q. What was the consideration that you paid?

A. The consideration for the shares I have with Island Service Company, payment of such was made partly in the form of equipment and automotive parts and \$2,000 in cash.

Q. Was the \$2,000 actually cash or check? What medium [7] of exchange was used?

A. At the time that the Island Service Company was organized I had personally deposited \$5,000 with NSC. The Island Service Company when it was organized, with my permission, took advantage of that deposit because at that time NSC requires the deposit of \$5,000 for the purchase of fuel products. It was agreed by the incorporators that \$2,000 of that should be credited to my investment.

(Testimony of Joaquin A. Perez.)

Q. Was that \$2,000 actually credited to your investment on the books of the company?

A. It was never reflected on the books, as I understand it, because the deposit was never reimbursed to me until March of 1950.

Q. It was on March of 1950?

A. About March of 1950.

Q. You mean you got the \$5,000 back?

A. Um-huh, from NSC.

The Court: What is NSC?

A. Naval Supply Center, at that time.

Q. (By Mr. Crain): Naval Supply Center—they were purchasing petroleum products from the military? A. That is correct.

Q. You got the \$5,000 back?

A. Right and turned it over to the company.

Q. All \$5,000? [8] A. All \$5,000.

Q. Is that \$5,000 reflected on the books of the company?

A. I can produce the check I indorsed.

Q. And that was in March, 1950?

A. On or about March, 1950.

Q. Who was keeping the books of the company at that time, Mr. Perez?

A. March, 1950—Mrs. Elizabeth D. L. Flores was assistant and Manuel F. Leon Guerrero. She was helping Manuel F. Leon Guerrero, who was actually responsible for setting up the books of the company.

(Testimony of Joaquin A. Perez.)

Q. Is Mr. Manuel F. Leon Guerrero the gentleman who is Director of Land Management today?

A. Right.

Q. Is Mrs. Elizabeth De Leon Flores one of the officers and a director of Guam Lumber Corporation?

A. Not that I know of.

Q. But Mr. Guerrero, Mr. Leon Guerrero, was the man who was keeping the books as of March, 1950?

A. To the best of my recollection, yes.

Q. This \$5,000 deposit that was returned from NSC then if it were entered in the books of the company would have been entered by Mr. Manuel F. Leon Guerrero?

A. That is right.

Q. Now, you testified you had no share certificate in the [9] company prior to September 30, 1952?

A. Except a certificate signed by the treasurer.

Q. Isn't it correct that no share certificates had been issued prior to September 30, 1952?

A. None that I know of.

Mr. Crain: I have nothing else.

Redirect Examination

By Mr. Turner:

Q. Just for purposes of clarification—it is my understanding that at the time this deposit was made with NSC that it was necessary to deposit a certain amount of money with that Navy activity in order to purchase gas on credit?

A. NSC requires all civilian purchasers to place a guarantee deposit with them.

(Testimony of Joaquin A. Perez.)

Q. And as a result of that guarantee deposit it was possible to purchase gas and be billed at the end of the month? A. That is right.

Q. After the corporation was formed the Island Service Company was able to purchase gas against that deposit?

A. If I may explain further—the deposit was made originally by myself. It was my own money and, as I said, Island Service Company, Inc., was making its purchases. I had that company named “Island Service Company,” so we were purchasing gasoline and Diesel oil from NSC on the strength of that privilege of Island Service Company, which was entirely [10] my own.

Q. And then after you got the refund check you indorsed it over to the company and cashed it?

A. That is right.

Mr. Turner: I have no further questions.

Mr. Crain: No other questions.

The Court: You may be excused.

Mr. Turner: Your Honor, I have subpoenaed certain of the company's books and I want to tell Mr. Crain what I need. I will state for the record the plaintiff will require the ledger, the journal entries, accounts receivable record, payroll book, bank statements and any copies of the appraisals made of the corporation. Would you call Mr. Stanley Kaneshiro?

MR. STANLEY K. KANESHIRO

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Turner:

Q. Will you kindly state your name and address? A. Stanley K. Kaneshiro.

Q. Where do you reside?

A. Trust Territories Compound.

Q. What is your occupation?

A. Chief Accountant, Trust Territories.

Q. What is it? [11] A. Chief Accountant.

Q. Trust Territories? A. Right.

Q. How long have you been so employed?

A. One year.

Q. Prior to your employment as chief accountant for the Trust Territory, by whom were you employed?

A. Public accounting and private practice.

Q. How long have you been engaged in public accounting, either on your own or as an employee for someone else? A. About six years.

Q. Were you ever employed as an accountant by Island Service Company, Inc., a Guam corporation? A. Yes.

Q. When were you so employed?

A. About September, 1951.

Q. Until what time?

A. Until September 30, 1952.

Q. Were you ever requested to make an audit of Island Service Company, Inc., records as of Oc-

(Testimony of Stanley K. Kaneshiro.)

tober 1, 1952? A. Yes, I was.

Q. By whom were you so requested?

A. By Attorney Lyle Turner.

Q. I show you a typewritten document and ask you if you recognize it? [12] A. Yes, I do.

Q. What is it?

A. Authorization to make a joint audit of Island Service Company.

Mr. Turner: I would like to have this submitted in evidence, your Honor, without objection.

Q. (By Mr. Turner): Did you, pursuant to such authorization, make such an audit?

A. Yes, sir.

Q. Was that audit made jointly with any other person?

A. The audit was made jointly with Ireneo Viray.

Q. Would you spell that?

A. I-r-e-n-e-o V-i-r-a-y.

Q. And who is Mr. Viray?

A. He was the bookkeeper of Mr. Hines, Mr. Cristobal Hines.

Q. I show you a one-page typewritten document and ask you if you can recognize it?

A. Yes, I do.

Q. What is that document?

A. It's a balance sheet of Island Service Company, Inc., which I prepared as of September 29, 1952.

Mr. Turner: Your Honor, I will ask to have this document admitted in evidence as Plaintiff's Ex-

(Testimony of Stanley K. Kaneshiro.)

hibit next in order—I understand without objection. [13]

The Court: Without objection, it will be received—Plaintiff's No. 3.

Mr. Turner: May I borrow Plaintiff's Exhibit 2 for a moment, please?

Q. (By Mr. Turner): Mr. Kaneshiro, I show you Plaintiff's Exhibit 2 and call your attention to the first sentence, which I shall read for the record: "You are to jointly make an audit of Island Service Company, Inc., from the inception thereof to October 1, 1952," and I note that your balance sheet which you say you prepared as a result of that audit is dated September 30, 1952. Was there any difference in the position of the corporation as of September 30 and October 1, 1952?

A. Can you repeat that?

Q. Well, in other words, the memorandum instructed you and Mr. Viray to make an audit of the corporation from its inception to October 1, 1952, and I notice your balance sheet is dated September 30, which is a difference of one day, and I ask if that would make any difference in the audit of the corporation?

A. If the memorandum had read "through October 1, 1952," we would have had to include any receipts through October 1, 1952.

The Court: Do I understand this is as of the close of business, September 30, 1952?

A. That is right. [14]

Q. (By Mr. Turner): Mr. Kaneshiro, I am

(Testimony of Stanley K. Kaneshiro.)

going to refer to Plaintiff's Exhibit No. 3 in connection with this testimony. I note that the current assets, cash on hand and in bank, September 30, 1952, you have listed as \$19,699.40. Will you kindly state to the court the basis on which the value of that asset was derived?

A. The cash on hand and cash in bank was checked and found to be exactly as recorded there.

Q. Do you have any working papers, Mr. Kaneshiro, that you base this balance sheet upon?

A. Yes.

Q. Can you tell me what the amount of cash on hand was on September 30, 1952?

A. Well, the cash on hand consisted of lots of items. The major item was \$16,862.53. That was transferred to Mr. Hines from Mr. Perez. It was withholding tax that Mr. Hines kept at the Hines enterprise.

Q. Do you have the amount of that withholding tax?

A. It was \$100.60.

Q. Go ahead.

A. It included checks which were returned by the bank, not accepted for deposit, which Mr. Hines held, amounting to \$67.73. It included cash receipts for September for the Island Service Co. of \$503.88. It included cash receipts for Agana Service Station which was \$132 even. The total cash on [15] hand, \$17,666.74.

Q. You said that the account with the bank was verified in determining the cash on hand and in bank?

A. That is right.

(Testimony of Stanley K. Kaneshiro.)

Q. Were any of those items jointly verified by you and Mr. Viray? A. It was, sir.

Q. Do you know of your own knowledge whether there was any disagreement between you and Mr. Viray between the total cash on hand and in bank?

A. Not that I know of, sir.

Q. Now, we have here the original books and records of Island Service Company, Inc., and if you need to refer to any of those, we will do so. The accounts receivable is listed as \$69,767.24. Can you kindly tell the court how that figure was reached?

A. The accounts in the record were checked to arrive at the figure.

Q. Was that a joint check by you and Mr. Viray? A. That is right.

Q. You set up a reserve for bad debts of \$6,583.87, is that correct?

A. That is right; that was the reserve on the books.

Q. And you had a net asset of accounts receivable of \$63,183.37, is that correct? [16]

A. That is right.

Q. You have notes receivable of \$1,000. What is that?

A. That is the note that is receivable from Henry Mar in the amount of \$1,000.

Q. You have an item "Deposit," \$1,700. What does that constitute?

A. It consists of two items. The first item, deposit with the Naval Supply Depot, warranty de-

(Testimony of Stanley K. Kaneshiro.)

posit, \$1,200, and a Naval deposit on garbage collection of \$500.

Q. For what purpose was that first deposit, \$1,200, that you testified to?

A. I don't recall correctly at the present time, but it was either Diesel or gasoline.

Q. That was a deposit to cover purchases made?

A. That is right.

Q. You have "Inventory-Merchandise," \$48,506.65. Will you state to the court how that figure was reached?

A. The inventory, the actual physical count was taken by a representative of Mr. Hines, and Mr. Viray and I did the pricing on the extensions and additions and the figure is the actual figure that we arrived at.

Q. Was that inventory reduced to writing?

A. I believe the records——

Q. Was the inventory reduced to writing?

A. Yes, sir. [17]

Q. Was it signed by any of the parties?

A. I don't recall exactly, sir.

Q. Now, "Inventory-Autos" you have listed as \$11,489.33. Will you kindly state how that was reached?

A. The inventory of autos was made by actual physical count and reconciled to whatever sales were made after the period of the audit and the records will substantiate it.

Q. Is that in the corporate records?

A. That is right, sir.

(Testimony of Stanley K. Kaneshiro.)

Q. At what price were the automobiles valued?

A. Actual cost to the corporation.

Q. Does that include freight and insurance to Guam?

A. That is right, sir.

Q. And that same statement applies with reference to the merchandise inventory?

A. That is right, sir.

Q. Who actually figured the cost on both of those two inventories?

A. It was done jointly.

Q. By whom?

A. Ireneo Viray and myself.

Q. Now, you have listed as prepaid insurance an item of \$728.44. What was that?

A. It was fire insurance paid to E. T. Calvo Insurance Company. The amount was \$728.44, which had not expired at the [18] time of the audit or period of audit.

Q. How was the amount of prepaid insurance determined by standard accounting methods?

A. The actual amount paid for the insurance is determined and the length of the coverage. If it covers one year and six months or if it expires in six months, it is deducted from the total cost and the prepaid insurance remains.

Q. Now, you have prepaid expenses listed of \$545.28. Of what do they consist?

A. Prepaid expenses consisted of four items: It's payment of business license, \$50; payment of auto license, \$48.58; payment of rent, Tamuning, \$400; payment of rent, Agana, \$46.70.

(Testimony of Stanley K. Kaneshiro.)

Q. Now, did you apply the same method of computation that you did to insurance, namely, prorating the amount of unused—

A. That is right.

Q. Over the entire period of the expenses. Now, you listed under fixed assets, office equipment, \$250. Would you kindly state what those items consist of and the amount thereof? The office equipment consisted of three items: One typewriter for \$25; one calculator, \$125, and one cash register, \$100; total amount, \$250.

Q. And you have a reserve for depreciation of \$61.25. How did you determine that?

A. We estimated the life of the equipment throughout the [19] year that had expired and made a calculation as to the length of life of the equipment for five years since the time of purchase and we divided the cost by five to arrive at the amount of depreciation.

Q. When you say "we," who do you mean?

A. Mr. Viray and I.

Q. Was that depreciation schedule jointly agreed upon by you and Mr. Viray?

A. I am not sure about that, sir, but the procedure was agreed upon.

Q. Now, you have a fixed asset listed of furniture and fixtures of \$845. Of what did those items consist?

A. They consisted of ten items, sir.

Q. Would you kindly read them off and the values apportioned to each?

A. One desk, \$37.50; one desk, \$37.50; one show-

(Testimony of Stanley K. Kaneshiro.)

case, \$90; one showcase, \$90; and one showcase, \$90; one showcase, \$90; one showcase, \$125; one showcase, \$125; one cash box, \$10; one filing cabinet, \$150.

Q. Now, the values affixed there—do they constitute the actual cost of that item?

A. That is right.

Q. And may I ask if that same statement is true of the office equipment of the corporation?

A. That is right. [20]

Q. And you have listed a reserve for depreciation on furniture and fixtures of \$108.42. How did you arrive at that figure?

A. We estimated the life of the furniture and fixtures and determined the expired portion.

Q. Now, when you say “we,” you mean you and Mr. Viray?

A. That is right, sir.

Q. You have buildings listed as \$26,651.92. I refer you to Plaintiff’s Exhibit 2: “Fixtures attached to the realty, excluding mechanical contrivances, shall be valued at cost to the corporation, depreciated to October 1, 1952, which depreciation shall be over the period of the lease of the corporation of the premises upon which the corporation is located,” and ask you how you reached that figure of \$26,651.92 for the buildings?

A. We checked the record to arrive at the actual cost of the buildings.

Q. So this \$26,651.92 is the actual cost to the corporation based upon a check of the actual records of the corporation?

A. That is right.

(Testimony of Stanley K. Kaneshiro.)

Q. And you have a reserve for depreciation of \$4,882.82. How did you reach that figure?

A. It was jointly agreed between Mr. Viray and myself.

Q. Was that based upon the lease of the corporation?
A. It depended upon the assets. [21]

Q. I mean, the depreciation. Did you depreciate the buildings over the period of the lease of the corporation?

A. That is right, but the useful life of some would end prior to the expiration of the lease. The depreciation varies because of assets, for instance, where an item was a quonset warehouse it wouldn't last as long as a frame building which was built there.

Q. Now, you have an item, "Equipment, \$12,445. What does that consist of?

A. That is the actual book value that was kept on the records of the corporation for equipment that was on hand.

Q. Does that include any of the rolling stock, mechanical fixtures?
A. That is right, sir.

Q. Any of the heavy equipment?

A. That is right, sir.

Q. Now, turning to the liabilities—you have accounts payable of \$5,015.61. Of what did that consist?

A. That consisted of items payable to various creditors of the corporation. You want them listed?

A. Yes, kindly list them.

A. J & G Motor Company, \$789.88; Marsport,

(Testimony of Stanley K. Kaneshiro.)

\$369.66; Guam Commercial Corporation, \$132.35; F. D. Perez & Bros., \$16.50; Hines Enterprises, \$712.85; J. A. Perez, coral, \$899.50; Getz Brothers, \$49.40; J. A. Perez, sand, \$10.50; Standard Vacuum Oil Co., \$22.75; Utility Agency of Guam, \$116.22; J. B. Little & Company, \$75.00; Pedro L. S. Sablan, \$45; Materne's, \$66.50; Guam National Enterprises, \$318.50. [22]

Q. You have drafts payable, \$31,237.48. Will you kindly state to the court how you reached that figure?

A. It was determined by contacting the bank and determining what drafts were outstanding.

Q. And do you have a list of those drafts?

A. Yes, sir.

Q. Kindly read them.

A. Bank of America drafts listed by creditors: Borg-Warner, \$2,261.01; Borg-Warner, \$6,028.92; Borg-Warner, \$7,202.07; Champion Products, \$2,361.79; Felt Products, \$1,391.51; Pan American Distributing Company, \$5,501.57; Pan American Distributing Company, \$624.42; Pan American Distributing Company, \$8,681.33; Getz Brothers, \$814.68.

Q. Now, you have notes payable of \$16,959.15. Of what do they consist?

A. They consist of notes that were prepared for Joaquin A. Perez from the records of the corporation.

Q. "Accrued Salaries and Wages"—of what did that consist?

(Testimony of Stanley K. Kaneshiro.)

A. That was for the period of September 16 to September 30 as determined from payroll records available.

Q. I see. Now, do I understand, that was of the close of business September 30 and they had not been paid? A. That is right.

Q. That was the last two weeks of the month of September, 1952? [23] A. That is right.

Q. "Accrued Taxes"—kindly state what those items are.

A. Accrued taxes payable to the Government of Guam for withholdings of employees' salaries.

Q. Was that for the second quarter of 1952?

A. That is right.

Q. Now, as I understand it, in figuring these liabilities on the accounts payable that was an actual joint check of the records?

A. That is right.

Q. Of the corporation. The drafts payable were determined by checking with the Bank of America?

A. That is right.

Q. Notes payable were determined by a specific check of the corporate records?

A. That is right, sir.

Q. Accrued salaries and wages were from the payroll ledger? A. That is right, sir.

Q. And accrued taxes——

A. Same thing, sir.

Q. So you reached total liabilities of \$55,440.71. Now, you have capital stock issued in the amount of \$60,000. On what do you base that?

(Testimony of Stanley K. Kaneshiro.)

A. We based that on the memorandum we received from [24] Lyle Turner and E. R. Crain.

Q. That is this Plaintiff's Exhibit 2?

A. That is right, sir.

Q. Now, you have an item, "Equipment Revaluation Surplus, \$26,151.89." Would you state to the court how you reached that?

A. The memorandum asked—it didn't require the auditors to determine the value of the equipment. The determination of the value of the equipment was made by others and I trusted the appraiser and the figures reflected as equipment revaluation surplus was the difference between the actual book value of the equipment and the figure we received from the attorneys as the cost of equipment.

Q. In other words, you have reflected on your balance sheet this mechanical heavy equipment that was to be appraised you have put in at book value and any figure above the book value reached by the appraisers would be listed under equipment revaluation surplus? A. That is right, sir.

Q. How did you compute this earned surplus?

A. That is the difference between the assets and liabilities.

Q. In other words, that is the difference between—after deducting from the assets the liabilities and the capital stock?

A. That is right. [25]

Q. How did you reach this "Net Profit for the Nine Months Ended 9/30/52"?

(Testimony of Stanley K. Kaneshiro.)

A. That is the actual amount from the operation of the business that we determined.

Q. You say "we"?

A. As recorded on the books.

Q. This \$30,774.33 was actually recorded on the books of the corporation?

A. That is right, sir.

Q. In what ledger is that reflected? In what book?

A. In the statements of the corporation.

Q. What statements? Filed with the Bank of America? Based upon those records?

A. Statements filed with the Government of Guam.

Q. And the statement so filed reflected that net profit for the nine months?

A. Just a moment. I retract, sir. That is the surplus we determined that we filed with the Government of Guam, sir.

Q. And who is "we"?

A. Mr. Viray and I determined that. It is the amount that was on the record as of September 30, 1952.

Q. As being the net profit of the corporation for the nine months of 1952? A. That is right.

Q. So you ended up with a capital stock issue of \$60,000 [26] and equipment revaluation surplus of \$26,151.89 and an earned surplus of \$86,703.05?

A. That is right, sir.

Q. Let me ask you if there was any change in the figure you utilized in computing the value of

(Testimony of Stanley K. Kaneshiro.)

the equipment which was to be appraised, whether it was above or below the figure you used it would either increase or decrease the earned surplus account by that amount, is that correct?

A. That is right, sir.

Q. Did you and Mr. Viray in your joint audit use standard accounting methods?

A. Yes, sir.

Q. Did you and Mr. Viray, of your own personal knowledge, have conferences with Mr. Sherwood Wiseman subsequent to the audit?

A. Yes, sir.

Q. I will ask you whether during these conferences and as a result of those conferences with Mr. Wiseman you and Mr. Viray jointly agreed to certain adjusting entries to be made by Mr. Wiseman?

A. That is right.

Q. You agreed to those adjusting entries?

A. That is right.

Q. Did Mr. Viray in your presence agree to them? A. That is right. [27]

Mr. Turner: That is all.

Cross-Examination

By Mr. Crain:

Q. When did you first go to work for the Trust Territory? A. November 1, 1954.

Q. Approximately one year ago?

A. That is right, sir.

Q. And prior to that time, what were you doing?

(Testimony of Stanley K. Kaneshiro.)

A. Public accounting.

Q. You had a license to operate as a public accountant in Guam?

A. That is right, yes, sir.

Q. Isn't it correct you also engaged in other businesses during the same period of time you testified you were privately practicing accounting?

A. Other businesses?

Q. Businesses other than accounting?

A. I invested some money in other businesses.

Q. You say you are chief accountant in Trust Territory?

A. That is right.

Q. You are over the accountants in Honolulu and all the other islands, is that correct?

A. There is no office in Honolulu now. Everything was turned over to Guam.

Q. You have testified that this was a joint [28] audit?

A. That is right.

Q. Conducted by yourself and Mr. Viray. Now that is not true, is it? You and Mr. Viray conducted your audits for the most part separately?

A. No, sir, for the most part together. We arrived at our own findings and reconciled them.

Q. Isn't it true that this balance sheet is entirely your own and has no connection with anything Mr. Viray did in the audit of these books?

A. Well, we tried to reconcile our figures whenever possible.

Q. Isn't it true the balance sheet is entirely yours?

A. Yes, sir.

Q. Isn't it true that this balance sheet in es-

(Testimony of Stanley K. Kaneshiro.)

sence was prepared before this audit was ever started?

A. No, sir, it was after the audit, sir. Everything was reviewed and changed.

Q. Isn't this substantially the figure you came up with before the audit was started?

A. In certain cases, yes.

Q. Isn't it a fact that up to the time this audit was begun there were no books of the Island Service Company?

A. No, sir, we had records.

Q. You had a complete set of books?

A. That is right. [29]

Q. Isn't it correct that all you had up to the time this audit was started was a cash record, a book of accounts and the payroll ledger?

A. No, sir.

Q. I believe you said you went to work for Island Service Company about September, 1951?

A. That is right.

Q. Who hired you?

A. Mr. Perez.

Q. Who had been in charge of the books prior to your taking over?

A. I am not certain, sir, but I think it was a Mr. Juan Santos; he gave me instructions.

Q. Did you find a set of books in September, 1951?

A. No, sir.

Q. There were no books?

A. There were records available, cash receipts records, payroll records, all the basic records.

Q. But no books?

A. I don't know what you call "books."

(Testimony of Stanley K. Kaneshiro.)

Q. There was not an actual working set of books?

A. From the records I could pick up anything I wanted, sir.

Q. Is that what you did?

A. How is that, sir?

Q. Did you make up a set of books from the existing [30] records you had there?

A. Not only from the records.

Q. In making up the set of books that you say you prepared after September, 1951, did you feel that all of the working data that should have been there was available to you? A. Yes, sir.

Q. You didn't find anything missing?

A. Well, there were a few items that weren't there but could be substantiated from further pursuit of the items.

Q. Did you substantiate them?

A. Well, in the case of Mr. Viray and I we jointly agreed——

Q. I am not talking about Mr. Viray. I am talking about when you were keeping the books.

A. What is that, sir?

Q. Did you pick up the various items and investigate them whenever—— A. No, sir.

Q. Did you say "no"?

Mr. Turner: I object, your Honor.

The Court: He said "no" and was going on to explain.

A. No; I accepted the officers' decision in cases

(Testimony of Stanley K. Kaneshiro.)

like that, sir, instead of further pursuing the item and costing the corporation more money.

Q. Actually you testified here that you arrived at your [31] figures on this balance sheet by the use of standard accounting procedures?

A. Yes, sir.

Q. You arrived at the figure of \$6,583.87 as a reserve for bad debts? A. Yes.

Q. The bad debts at that time, or rather the outstanding accounts receivable were over \$69,000, right? A. That is right.

Q. Those accounts receivable consisted of several hundred items, did they not? A. Yes, sir.

Q. Actually between September, 1951, and September, 1952, were you merely the bookkeeper at Island Service Company or did you have other duties? A. I was a public accountant, sir.

Q. You mean you were only working part time at Island Service Company?

A. A public accountant handles quite a few accounts, sir.

Q. You were not employed as an employee? You were working for other people?

A. That is right, sir.

Q. How much time approximately did you spend at Island Service Company?

A. It depends on the circumstances, sir. [32]

Q. What was the basis of remuneration at that time?

A. \$150—I am not sure; I am not positive about it—\$150 a month.

(Testimony of Stanley K. Kaneshiro.)

Q. And you can't recall how much time you spent on the books on an average?

A. No, sir.

Q. Now, isn't it a fact that these accounts receivable at the time that you prepared this balance sheet for September 30, 1952, ran clear back into 1949?

A. Not clear back, sir.

Q. But——

A. It started September, 1949, sir.

Q. But 1949 and '50?

A. The accounts receivable.

Q. Now, in standard accounting practice, when does an account receivable begin to be stale? If it is not paid at the end of 30 days, is it still as good as it was when it was less than 30 days old?

A. I don't know what you mean. Would you explain?

Q. Under standard accounting principles, when does a debt begin to appear to be uncollectible?

A. It depends upon the circumstances, sir. Some corporations give customers 90 days, some give them 60 days, some give them ten days; it depends upon the circumstances.

Q. Isn't it a fact that the majority of these accounts [33] receivable were individuals?

A. That is right, sir.

Q. When do they begin to look dangerous? I mean, say, that the account has become six months old. Does it appear to be as collectible then as it was when it was 30 days old?

A. It depends upon the circumstances. A lot of

(Testimony of Stanley K. Kaneshiro.)

these accounts ran continuously. For instance, a grading job that lasts six months—there is an accumulation of charges.

Q. But the bulk of these accounts were individuals? A. There were a lot of them.

Q. Actually most of those accounts by September, 1952, were over a year old, were they not?

A. That is right.

Q. Did you feel that with standard accounting principles your reserve for bad debts was a fair reserve?

A. I am sorry to say—as of September 30 only—I made no attempt to make a reserve for bad debts because it was for the period ending September 30. It was jointly agreed to set up a reserve for bad debts as of September 30 so no reserve was set up for the year 1952.

Q. This \$6,000 figure was not the joint agreement between you and Mr. Viray?

A. No, sir, there was a reserve set up only for September 30, 1951.

Q. Now, in the final analysis, there was not a joint audit [34] between you and Mr. Viray?

A. There was, sir. We conducted an audit as of September 30.

Q. How long did this audit take?

A. As far as I am concerned it was a very short time for me. I went through the records and arrived at certain figures and waited for Mr. Viray to catch up.

Q. What time did you spend on this?

(Testimony of Stanley K. Kaneshiro.)

The Court: What time did you actually work?

Q. (By Mr. Crain): The time that you sat there?

A. I don't know. It was a continuous operation for some time until Mr. Viray got through.

Q. What were you doing?

A. Well, if he had any questions he would ask me.

Q. How long did this audit take?

A. It may be still going on as far as I am concerned; you haven't said.

Q. How much have you been paid so far for your services?

Mr. Turner: Objection. It is immaterial.

Mr. Crain: I don't think it is immaterial.

The Court: This is cross-examination. The objection will be overruled.

Q. How much have you been paid?

A. I don't know exactly.

Q. Is it in excess of \$4,000? [35]

A. No, sir.

Q. Do you know how much?

A. In a lot of cases your client has refused to reimburse me for time spent at the office.

Q. You mean conferences?

A. No, sir, arriving at the Island Service Company when the auditor didn't show up and I sat waiting for the auditor.

Q. Were you ever employed by the Government of Guam? A. Yes, sir.

Q. How long?

(Testimony of Stanley K. Kaneshiro.)

A. Nine months, sir, just about.

Q. Nine months. Did you sever your connection with the Government of Guam of your own volition?

A. It was at the request of——

The Court: Now, just a moment. I am not going to get into collateral issues.

A. I am willing to answer that, sir.

Mr. Crain: I will withdraw the question if the court please. I have no other questions.

Redirect Examination

By Mr. Turner:

Q. Do I understand that you worked independently on your figures in the audit and Mr. Viray did and on some of them you worked together?

A. That is right. [36]

Q. This balance sheet represents the results of your audit—the figures upon the items where you and Mr. Viray agreed and where you disagreed they represent your findings?

A. That is right.

Q. But this is your audit?

A. That is right.

The Court: May I see that?

Examination by the Court

Q. You testified, Mr. Kaneshiro, that when you and Mr. Viray had completed your respective audits that you reconciled them with Mr. Wiseman?

A. Yes, sir.

(Testimony of Stanley K. Kaneshiro.)

Q. Does this balance sheet represent the reconciliation with Mr. Wiseman?

A. No, sir, it does not.

Mr. Turner: I am willing to produce Mr. Wiseman's reconciliation through his testimony.

Q. (By the Court): This, as I understand it, represents your audit independent of any reconciliation? A. That is right.

Q. Now you testified that the reserve for bad debts was that which appeared on the books of the corporation? A. That is right, sir.

Q. In other words, you had nothing to do with the formula for establishing bad debts? [37]

A. It was agreed between Mr. Viray and I to leave that to Mr. Wiseman in each particular case where there was a question as to the amount to set up; it was agreed to leave it to him.

Q. Where did you get your figure of \$6,583.87 as a reserve for bad debts?

A. That's the amount I set up as ten per cent of charge sales.

Q. That assumes then that of accounts receivable as of September 30, 1952, of \$69,767.24, for the purposes of your audit, you assumed that all of those accounts would be paid except \$6,583.87?

A. Subject to a review of the accounts, sir, which was to be made.

Q. But for the purposes of your balance sheet?

A. Yes, sir.

Q. That was your assumption that those debts would be 90 per cent paid?

(Testimony of Stanley K. Kaneshiro.)

A. We discussed the matter and decided and talked about setting up a large reserve on that and it was decided between I and the attorneys we would leave that for the third party, Mr. Wiseman, as to what amount to set up.

Mr. Crain: Do I understand the witness correctly that that was agreed between you and the attorneys?

Q. (By the Court): You said it was agreed between you and Mr. Viray? [38]

A. No, sir. I took this matter up—I consulted Mr. Turner on this matter and there was disagreement with Mr. Viray and I asked what amount to set up and Mr. Turner said to leave the matter to Mr. Wiseman.

Q. Now I want to ask about the drafts. At the time a draft is issued is not the amount of the draft deducted from the balance at the bank?

A. I didn't get you.

Q. When a draft is issued is not the amount of that draft deducted from the balance of the bank account? A. No, sir.

Q. It's very similar to a check, isn't it?

A. No, sir, it was on a credit basis, sir. The check was issued and merchandise was in transit and we set up a liability.

Q. At the time you had a provision for overdraft at the bank? A. That is right, sir.

The Court: Questions, gentlemen?

Mr. Turner: I just want to ask one question.

(Testimony of Stanley K. Kaneshiro.)

Redirect Examination

By Mr. Turner:

Q. That reserve you set up for bad debts was one you selected for balance sheet purposes?

A. That is right. [39]

Recross-Examination

By Mr. Crain:

Q. And it was agreed upon by you and Mr. Turner that it would remain the same?

A. Not remain the same.

Q. On your balance sheet?

A. That is right.

The Court: And subject to reconciliation?

A. That is right, sir.

The Court: You want to take a ten-minute recess? The court will recess for ten minutes.

(The court recessed at 10:45 a.m., October 24, 1955, and reconvened at 10:55 a.m., October 24, 1955.)

The Court: Call your next witness.

Mr. Turner: We will call Mr. Ireneo Viray as the next witness.

MR. IRENEO VIRAY

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address?

A. Ireneo Viray, Block 8, Lot 1, Sinajana.

Q. What is your occupation?

A. I am an accountant. [40]

Q. What training in accountancy have you had? Any college? Last training in accountancy?

A. Yes, sir, I was working with an accountant and auditor, with Mr. Thomas Campbell. I audited under Mr. Thomas Campbell.

Q. How do you spell that name?

A. C-a-m-p-b-e-l-l.

Q. Where was that? A. In Manila.

Q. And how long have you been working as an accountant? A. Three years.

Q. By whom are you now employed?

A. By Butler's, Inc.

Q. In what capacity?

A. As an accountant.

Q. Were you ever employed as an accountant by Island Service Company, Inc.? A. Yes, sir.

Q. Over what period were you so employed?

A. That was—I don't remember the month but it was in 1952.

Q. Until what time?

A. Until July 31 this year.

Q. Prior to when you went to work for Island

(Testimony of Ireneo Viray.)

Service Company, Inc., in 1952 by whom were you employed? A. By Koster and Whyte. [41]

Q. Were you ever employed by Mr. Cristobal Hines in connection with his busioness?

A. I was.

Q. And for what period? That is prior to Island Service Company, Inc. employment.

A. It was in May, 1952; the beginning was in May, 1952, and the end July 31, 1955.

Q. Mr. Viray, did you ever have occasion to make an audit of Island Service Company, Inc., as of October 1, 1952? A. Yes, sir.

Mr. Turner: May I have Plaintiff's Exhibit 2, please.

Q. (By Mr. Turner): I show you a two-page document which has been marked Plaintiff's Exhibit 2 and ask you if you recognize it?

A. Yes, sir.

Q. What is that document?

A. It's a joint memorandum to Mr. Kaneshiro and myself.

Q. Did you receive such a document?

A. I got a copy, yes, sir.

Q. And did you conduct your audit of the Island Service Company, Inc., books as of October 1, 1952, pursuant to these instructions? A. Yes, sir.

Q. The instructions set forth in Plaintiff's Exhibit 2 provide that there shall be a joint audit of the books and [42] records of Island Service Company, Inc., from the commencement of the business

(Testimony of Ireneo Viray.)

until October 1, 1952. Did you conduct such a joint audit with any other person?

A. I do not know if that was a joint audit because Mr. Kaneshiro audited and I audited.

Q. I see—did you ever jointly audit any particular items?

A. Well, on the buildings we agreed to let the figures stand as they were.

Q. Well, I will get into those items as we go along, but you and Mr. Kaneshiro both audited at the same time?

A. Yes, at the same time.

Q. Over what period did your audit run?

A. From the inception of the business up to October 1.

Q. I mean when did you commence your audit?

A. I don't remember anymore.

Q. Was it after the 1st of October, 1952?

A. It was maybe 1953.

Q. How long did it take you to conduct the audit?

A. More than a year.

Q. Were you occupied on other duties during the regular work day?

A. Yes, sir.

Q. What duties were you occupied with during the regular working day? [43]

A. During the working day I was working half a day for Hines Enterprises and half a day, Island Service Company.

Q. When did you conduct the audit?

A. I left my regular work and I made those after 5 o'clock.

(Testimony of Ireneo Viray.)

Q. I show you a piece of paper, a one-page document, typewritten, and ask you if you recognize it?

A. Yes.

Q. What is that?

A. This is the balance sheet which I made, the figures of which were taken from the general ledger.

Q. Is that the result of the audit that you made of the books and records of the Island Service Company, Inc., from the commencement of the business until October 1, 1952?

A. Yes, sir.

Mr. Crain: No objection.

Mr. Turner: Your honor, I would ask to have this marked as Plaintiff's Exhibit next in order, without objection, I understand.

The Court: Very well, without objection, it will be received as Plaintiff's 4.

Q. (By Mr. Turner): Mr. Viray, the document which you previously identified has now been marked Plaintiff's Exhibit 4. I notice that it is marked "Balance Sheet 29 September 1952," while the joint instructions provide that the audit would be from the inception to October 1, 1952. Would the discrepancy [44] between the dates of September 29 and October 1 make any difference?

A. Yes, sir, it will make one day's difference.

Q. Why did you close off the balance sheet as of September 29?

A. Because September 29, 1952, Mr. Hines took over all the responsibility of receiving money and everything—from September 30.

Q. So you just audited this up to September 29,

(Testimony of Ireneo Viray.)

1952, which is prior to the time Mr. Hines took over everything? A. That is right.

Q. Now we have here in the courtroom—Mr. Hines has brought them in—all of the books and records, as I understand it, of Island Service Company, Inc. In connection with explaining Plaintiff's Exhibit 4 what documents did you require in order to support this balance sheet with the general records? A. The general ledger, sir.

Q. Would you kindly go down there and pick out the documents you require including your working papers? A. Yes, sir.

Q. I believe, Mr. Viray, you have previously testified that this constitutes the balance sheet that you prepared as a result of your audit, is that correct? A. Yes, sir.

Q. Now you have listed cash funds on hand, \$16,690.40. [45] What is that based upon? If you refer to the general ledger, will you kindly state for the record the page number of the general ledger from which you are reading.

A. Excuse me. I would like to get another book.

Q. Are there schedules missing that you require in connection with your testimony?

A. I did not see two files in there, Files 1 and 2.

Q. What are those Files 1 and 2?

A. I do not remember, sir.

Q. Are those schedules?

A. Schedules of my audit.

Mr. Turner: May I ask if during the noon recess

(Testimony of Ireneo Viray.)

you would check the corporate records and see if Schedules 1 and 2 are available.

Mr. Crain: If the court please, Mr. Hines is not the accountant, and I think Mr. Viray will have to go with him to show him what he wants.

Mr. Turner: I think he will be glad to do that.

Q. (By Mr. Turner): Now, subject to procuring Schedules 1 and 2—will you require those schedules to testify regarding the cash on hand?

A. I do not know if I will because I do not know what is missing.

Q. Do you remember what this cash on hand consisted of?

A. It consisted of cash money given by Mr. Perez to Mr. Hines on 29 September. [46]

Q. Was that \$16,000? A. Yes, sir.

Q. That is cash Mr. Perez gave Mr. Hines on September 29? A. Yes, sir.

Q. And did you see the transaction?

A. Yes.

Q. You verified that there was \$16,000 delivered by Mr. Perez to Mr. Hines?

A. I am not exactly sure of the figure, but I know that it was cash money given by Mr. Perez to Mr. Hines.

Q. And this cash figure from the current assets was drawn from the books of the company, the original books and records? A. Yes, sir.

The Court: Now, in order to avoid confusion, will you clarify the question as to whether Mr.

(Testimony of Ireneo Viray.)

Perez delivered this cash as secretary of the corporation rather than in an individual capacity?

Q. (By Mr. Turner): Was this transfer of cash of the corporation from Mr. Perez to Mr. Hines in connection with Mr. Perez' turning over the active management of the company to Mr. Hines? A. I do not know, sir.

Q. Well, after September 30 you testified Mr. Hines took over the control and management of Island Service Company, Inc., [47] is that correct?

A. Yes, sir.

Q. And was this transfer of cash from Mr. Perez to Mr. Hines in connection with that turn-over? A. Yes, sir.

Q. And this \$16,000 cash was money the corporation collected? A. Yes, sir.

Q. Now, you have cash in bank of \$2,407.66. How was that figure derived?

A. I got that from the bank statement and I reconciled the bank statement and found it correct.

Q. That \$2,407.66 was the reconciled and verified bank balance? A. That is right.

Q. That makes a total of \$19,098.06. Could I borrow Plaintiff's Exhibit 3, your Honor? Mr. Kaneshiro testified that he had found the cash on hand and in the bank, \$19,699.40, and he included in that amount certain withholding tax due to the Government of Guam which was on hand. Did you include that figure in cash on hand and in bank?

A. I did not, sir.

Q. How much did that amount to?

(Testimony of Ireneo Viray.)

A. I do not remember now, but I did not include it.

Q. Can you verify from the books how much was due and [48] owing?

A. I did verify the withholding tax, sir.

Q. Do you have that listed anywhere?

A. No, sir.

Q. Well, why did you not include the withholding tax monies on hand in the cash on hand and in the bank?

A. Because I thought that money belonged to the Government of Guam and did not belong to the corporation anymore.

Q. I see, but the corporation had it at the time?

A. Yes, sir.

Q. And if you had included that withholding tax money that was on hand in the cash on hand and in the bank that would increase your figure by the amount of the withholding tax money, is that correct?

A. Yes, sir.

Q. In other words, your figure here includes merely the cash on hand and in bank?

A. Yes, sir.

Q. Now, turning to the accounts receivable, you have "General Accounts Receivable" of \$64,576.91. Upon what was that figure determined?

A. I determined that figure after checking all the extensions, the debits and credits of all the accounts.

Q. Was there an accounts receivable ledger?

A. Yes, sir. [49]

(Testimony of Ireneo Viray.)

Q. There is one here? A. Yes.

Q. Kindly get it. That is the accounts receivable ledger sheet? A. Yes.

Q. How is that set up? Is there a ledger sheet for each accounts receivable?

A. For each month.

Q. Is that for each month, each individual account?

A. It is continuous, sir—August, September—

Q. For each individual account?

A. One leaf each.

Q. How did you determine \$64,576.91?

A. I made a list of all these after checking this book. During the course of my check-up on this book I found several errors in the extensions. For instance, this account of Camacho. There is \$1,000 difference there. The balance should be \$6,875.60; it is clear here.

Q. After making those bookkeeping adjustments you reached the total of \$64,576.91?

A. Yes, sir.

Q. Let me ask you—down here you have an asterisk and down at the bottom you have “Figures unsettled, pending, and/or requiring check-up.” Would you kindly explain to the court what you mean by that? [50]

A. It was my intention to write off all doubtful receivables instead of allowing them to stand.

Q. I see, so that is what you mean by the asterisk and “Figures unsettled, pending, and/or

(Testimony of Ireneo Viray.)

requiring check-up''? You meant that you had not written off the accounts that you had felt were bad?

A. I do not know if these are the figures—the \$64,576 is my figure after writing off all doubtful receivables.

Q. You have a reserve here for depreciation, is that correct? A. Yes, sir.

Q. Now could you have written off doubtful accounts or accounts that you felt were bad and still set up a reserve for the accounts that you kept?

A. Well, yes, sir.

Q. Let me ask you—Mr. Kaneshiro in his testimony in connection with his audit set forth the accounts receivable as \$69,767.24. Do you know why the difference between this figure of \$64,576.91 and his figure?

A. I do not remember, but one of them is the differences in the extensions of this account.

Q. You mean they are bookkeeping errors?

A. They are bookkeeping errors.

Q. Not because you wrote off any debts as bad debts before arriving at this figure? [51]

A. Yes.

Q. It's all bookkeeping errors? A. Yes.

Q. Now in connection with notes receivable you have listed here \$1,000. Mr. Kaneshiro testified it was a note of Henry Mar for \$1,000, is that correct?

A. Yes, sir.

Q. So you and Mr. Kaneshiro are in agreement on that item, notes receivable, \$1,000?

(Testimony of Ireneo Viray.)

A. Yes, sir.

Q. Now you have merchandise inventory, parts and petroleum products, \$48,540.20. Mr. Kaneshiro had merchandise inventory, \$48,506.65. Referring to Plaintiff's Exhibit 2, which is the joint instructions that you and Mr. Kaneshiro received, stock in trade was to be listed at actual cost to the corporation delivered to the warehouse of the corporation. Is that the means by which you reached that figure? A. Yes, sir.

Q. In other words, its actual cost to the corporation, including freight, insurance, port-handling charges and delivery to the warehouse?

A. Yes, we allowed only seven per cent on this; we took the invoice figures.

Q. And added a percentage for insurance, freight, and so on? [52] A. Yes, sir.

Q. Let me ask you—was this inventory of parts and petroleum products the result of any actual inventory taken? A. Yes, sir.

Q. Who took that inventory? A. We did.

Q. Who is "we"?

A. Myself and Mr. Tomas—I forget his second name—one of the employees.

Q. In other words, the inventory was taken on the company premises by the company employees?

A. Yes.

Q. Was that reduced to writing, typed out?

A. Yes, sir.

Q. Mr. Kaneshiro testified that his merchandise

(Testimony of Ireneo Viray.)

inventory figure was \$48,506.65. You have \$48,-540.20. Do you know how that difference arose between you and Mr. Kaneshiro?

A. I do not.

Q. Now your next item is automobiles which you list under inventories as \$13,637.14. How was the value of the inventory of automobiles determined?

A. I determined it by counting the automobiles that were in the premises at the time.

Q. And then did you determine the cost thereof by reference to actual invoices, freight charges and other expenses? [53]

A. Yes, sir.

Q. Mr. Kaneshiro had \$11,489.33. Do you know how the difference between your figure and his might have occurred?

A. I do not remember.

The Court: Do I understand that these are new automobiles?

Mr. Crain: Yes, sir, five new Hudsons.

Q. (By Mr. Turner): Now referring to the fixed assets. You have listed the buildings at \$17,250. Mr. Kaneshiro lists buildings, \$26,651.92: less reserve for depreciation, \$4,882.82; net, \$21,-769.10. Mr. Viray, referring to Plaintiff's Exhibit 2, which is this joint memorandum, fixtures attached to realty were to be valued at cost depreciated to October 1, 1952. In connection with the leasehold they were to be depreciated over the period of the lease. Mr. Kaneshiro testified that certain of the

(Testimony of Ireneo Viray.)

buildings did not have a useful life as long as the lease and were depreciated on a lesser basis, is that correct? A. Yes, sir.

Q. There is a difference between your and Mr. Kaneshiro's figures. Could you kindly state to the court how you reached your total of \$17,250?

A. I do not remember now how this was established, but I do remember we made an agreement on the buildings that the figure he had and I had which were the same.

Q. Oh, you and he agreed on what the cost of the buildings were, is that correct? [54]

A. Yes, sir, but I do not know why this is \$17,250 and this is \$26,000.

Q. Do you have the original ledger which may be in the courtroom which might reflect the cost of the buildings? In other words, the original cost of the buildings would be set up on your records?

A. I will show you this buildings page of the general ledger, \$17,250.

Q. But you don't have any ledger sheet which reflects the actual cost of the buildings to the company, do you?

A. (Shows page to counsel.)

Q. This is page 8 of the general ledger, isn't it, marked "Buildings," and it says "Trial Balance, December 31, 1952"?

A. Yes, sir. I will show you journal entry No. 1 where it shows "Buildings, \$17,250."

Q. And that is what you drew your figure on

(Testimony of Ireneo Viray.)

your balance sheet from? A. Yes.

Q. Less the depreciation which you have listed here at the bottom as reserve for depreciation, which is a depreciation of all of the fixed assets, so you have a total list of fixed assets of buildings, \$17,250; office equipment, \$200; furniture and fixtures, \$725; heavy equipment, \$5,550; automotive equipment, \$5,200; shop equipment, \$1,695. Now let me ask you if [55] this heavy equipment and automotive equipment are the items that were appraised by the appraiser? A. Yes, sir.

Q. So that if any different value was given to these two items of heavy equipment and automotive equipment your net amount would be increased or decreased depending upon whether your value was greater or lesser than the appraiser's for these two items, is that correct? A. Yes, sir.

Q. This shop equipment—was that appraised?

A. Yes, sir.

Q. Let me ask you—isn't it true that you listed this heavy equipment, automotive equipment and shop equipment at actual cost on here?

A. Yes, sir.

Q. And didn't ascribe any market value or any other item but the cost of the equipment?

A. Yes, sir.

Q. Now you have prepaid insurance of \$728.44. Do you remember what insurance policy that was and whose agency it was?

(Testimony of Ireneo Viray.)

A. I believe it was Workmen's Compensation Insurance by Calvo.

Q. Those two figures agree, do they not, Judge?

The Court: That is right.

Q. (By Mr. Turner): Now you have deposits of \$1,700. Do [56] you remember what those deposits were?

A. I believe those deposits, if I remember correctly—one of them was from the NSD.

Q. And what was it?

A. The deposit, I believe, it was \$1,000 for the benefit of buying diesel fuel oil from them.

Q. Would any of the books of record here verify what those deposits were? Kindly check.

A. Journal entry No. 1 of Mr. Kaneshiro for \$1,200 was a deposit made with the Naval Supply Depot; \$500 was a deposit made with NSD for garbage collection.

Q. And that is journal entry No. 1. All right, now you list merchandise in transit of \$24,737.25. How did you determine this figure of merchandise in transit?

A. At first I determined this merchandise in transit, \$24,737.25, as the merchandise that was in transit or at the dock during the time we took the inventory.

Q. And you have the actual records, an itemized list of that merchandise? A. Yes, sir.

Q. Is there any particular original document—

(Testimony of Ireneo Viray.)

what ledger would that be reflected in, just as a matter of identification for the record?

A. I believe this came from my worksheets.

Q. And your worksheets are now a part of the records of [57] the company? A. Yes.

Q. That would be determined from invoices received that the merchandise was in transit?

A. Yes.

Q. Plus the freight charges and other items of expense? A. Yes.

Q. Now you have listed a J. A. Perez clearing account. Would you first state to the court what a clearing account is from an accounting standpoint?

A. A clearing account from the standpoint of the accountant is a doubtful account until it is cleared by the company—whether we are to charge or credit the amount.

Q. Isn't it true in connection with a clearing account that you have a liability and an asset set up in the same amount? In other words, you have a J. A. Perez clearing account of \$30,280.65, but you have a deferred liability expense of \$30,266.62. In other words, don't they offset each other?

A. They do.

Q. It would not affect the surplus or net worth of a company in any way? A. It would not.

Q. The same thing would apply to the C. A. Hines Clearing Account of \$14.02? [58]

A. Yes.

(Testimony of Ireneo Viray.)

Q. And you have set up a corresponding suspense liability of the total of these two?

A. Yes.

Q. But they do not in any way affect the surplus or net worth of the company?

A. They do not.

Q. You have accounts payable of \$6,993.14. How did you determine that figure?

A. I determined that figure by finding the amount owed by the company to its creditors.

Q. Do you have a list of those accounts payable?

A. I had one; I do not know now——

Q. Will you see if you can find them in your working papers? I would like to put those into the record.

A. Page 8 of my audit book.

Q. Will you read the list of creditors?

A. James G. Little, \$75; Pedro, L. G. Sablan, \$45; Dingo Materne, \$66.50; J & G Motor Co., \$789.88; Marianas Sports & Electric Co., \$369.66; Guam Commercial Corp., \$1,323.35; Hines Enterprise, \$712.85; Joaquin A. Perez, \$3,195.53 and \$10.50; Getz Brothers, \$49.40; Standard Vacuum Oil Co., \$222.75; Government of Guam, \$116.22; Frank D. Perez and Brothers, \$16.50.

Q. All right, your next item listed is drafts payable for \$41,749.47. Would you list the drafts payable that you have? [59]

A. My drafts payable appearing on the liability side of this balance sheet amount to \$41,749.47, and I do not remember how I arrived at that figure, but

(Testimony of Ireneo Viray.)

I do know that that figure is the amount of merchandise that is in the docks.

Q. Page 9 of your working papers in connection with this balance sheet—don't you find drafts payable of \$31,617.28? A. Yes, sir.

Q. Do you know what the difference is between \$31,000 and \$41,000?

A. You see, the merchandise covered by these drafts before were presumed to amount to \$31,000, but on checking the figures with the amount of invoices I found that there should be \$41,749.17, or a difference of \$10,000.

Q. In other words you found that you had invoices for merchandise in transit which were for \$10,000 more than the drafts represented at the bank and you assumed that difference to be sight drafts which had not yet arrived at the bank?

A. Yes, sir.

Q. And did you actually verify with the bank how much was owed to drafts payable?

A. I did not, sir.

Q. You did not? The next item is notes payable of \$13,659.15. Isn't that money owed by the corporation to Mr. Joaquin Perez?

A. Yes, sir. [60]

Q. And that was represented on the company records? A. Yes, sir.

Q. You have accrued charges, payrolls, \$1,754.05. I believe that coincides with the figure Mr. Kane-shiro had and I believe you two are in agreement

(Testimony of Ireneo Viray.)

on that figure? A. (Nods head.)

Q. That represents the payroll for the last two weeks of September which had not been paid because it wasn't paid until the first of the month?

A. Yes, sir.

Q. And taxes you have listed, \$474.12. I believe that is withholding taxes? A. I think so.

Q. Now in that respect if you were to consider the withholding taxes which the company had withheld from the employees' wages as a part of the cash on hand, that figure would have to be added to your cash on hand and in bank, wouldn't it?

A. Well, I believe this figure resulted from tax prior to the period.

Q. I see, but it is still money withheld and not paid into the government, is that right?

A. That is right.

Q. Now passing over this deferred liabilities suspense account which you testified is an offset from the J. A. Perez and C. A. Hines clearing accounts and doesn't affect the balance [61] sheet, you have capital paid in of \$60,000 and you have earned surplus from November 1, 1949, which I believe was the beginning of the corporate history, to December 31, 1951, \$38,893.93, and from January 1, 1952, to September 29, 1952, \$22,334.74. You have an asterisk on that one, showing that the figure is undetermined. Why would it be undetermined? That is the earned surplus for that part of the calendar year 1952.

(Testimony of Ireneo Viray.)

A. I put in an asterisk here because this figure may be changed when other adjustments are made.

Q. You mean if there were any other adjustment that earned surplus would be adjusted?

A. Yes, sir.

Q. In other words, your earned surplus is determined, isn't it, assuming that you have no change in the reserve for depreciation or other asset value, your earned surplus is assets minus liabilities?

A. Yes, sir.

Q. So that any adjustment in the asset or liability side would necessarily adjust the surplus?

A. Yes, sir.

Q. But wouldn't the surplus be the assets minus the liabilities and the capital and that would be the surplus? A. (Nods head.)

Q. I want to check a few specific items, and I will ask you to kindly refer to your accounts payable. Wasn't there an [62] account payable of \$318.50 which was due to Mr. Bart Pugh which was not included in your schedule of accounts payable? A. Yes, sir.

Q. That should be included in your accounts payable?

A. My reason was when I tried to verify this account with the creditors, Pugh was not able to produce any proof.

Q. But it was on the books of the company, wasn't it, as an account payable? A. Yes, sir.

Q. So that will explain to that extent the differ-

(Testimony of Ireneo Viray.)

ence between your and Mr. Kaneshiro's figures of the accounts payable because I believe he had that on in there? A. Yes.

Q. Now, leaving aside all the differences, other differences, between you and Mr. Kaneshiro, let me ask you if you prepared your audit pursuant to the instructions contained in the joint memorandum?

A. Yes, sir.

Q. And did you use standard accounting methods in that? A. Yes, sir.

Q. Let me also ask you if subsequent to your audit you had any meetings and discussions with Mr. Sherwood Wiseman and Mr. Stanley Kaneshiro in resolving any of the differences between your audit and Mr. Kaneshiro's audit?

A. Yes, sir. [63]

Q. Where were those meetings held?

A. I do not remember now, sir, but I believe we held meetings more than three times.

Q. And were you and Mr. Kaneshiro present at those meetings? A. Yes, sir.

Q. Let me ask you were you in agreement and was Mr. Kaneshiro in agreement when Mr. Wiseman made adjustments? Were they acceptable to both of you? A. Yes.

Mr. Turner: That is all the questions I have.

(Testimony of Ireneo Viray.)

Cross-Examination

By Mr. Crain:

Q. Is it correct, Mr. Viray, that you are no longer employed by either Island Service Company or Mr. Hines? A. Yes.

Q. When did you resign from those two jobs?

A. About the middle—about the end of July, 1955.

Q. Is it correct that you severed your connection of your own volition with both Island Service Company and Mr. Hines? A. Yes, sir.

Q. Actually you left a letter on your desk for Mr. Hines telling him that you no longer wished to consider the association, is that right? [64]

A. Yes, sir.

Q. When did you go to work for Butler's, Inc.?

A. August 3.

Q. And the letter that you left for Mr. Hines is dated August 2, 1955, is that correct?

A. I do not remember.

Q. Now, Plaintiff's Exhibit No. 4, Mr. Viray, that you have been testifying from here, is labelled, "Balance Sheet, 29 September, 1952, from tentative trial balance and profit and loss statement," is that correct? A. Yes, sir.

Q. That wasn't your final balance sheet on this audit, was it?

A. I remember I made two balance sheets; I do not know if this is the final one.

(Testimony of Ireneo Viray.)

Q. Is there any way you can refresh your own memory as to the date you prepared this particular balance sheet? A. I do not remember.

Q. Would that not be in your working papers that you have here?

A. It may be in my working papers; it would take time to find it.

Q. Well, you have no date on that particular balance sheet, do you? A. No, sir. [65]

Q. I would show you a carbon copy of that balance sheet and ask you if that is the same as Plaintiff's Exhibit No. 4?

Mr. Turner: Well, if he is going to show anything for the record, your Honor, I want it marked for identification and made a part of the record.

The Court: It has to be identified first.

Mr. Crain: Well, this is a bound volume. Can I have the volume marked for identification?

Mr. Turner: Sure.

The Court: Now just a moment. I am not sure that this objection is valid. You simply asked him if they are alike.

Mr. Turner: Could you read the question?

(The reporter complied with the request.)

Mr. Turner: Well, it is still something that has been testified to and I think it should be marked for identification.

Mr. Crain: Well, it is identical.

The Court: It's a carbon copy.

(Testimony of Ireneo Viray.)

Mr. Turner: Excuse me, I thought it was a different balance sheet.

Q. (By Mr. Crain): Now, is this carbon copy the same as Plaintiff's Exhibit No. 4, Mr. Viray?

A. I do not believe this is a carbon copy.

Q. Well, are they identical insofar as the figures are concerned?

A. So far I have seen the same figures. [66]

Q. Well, is it the same or isn't it?

A. It's the same.

Q. Now the copy which I have, which is identical with Plaintiff's Exhibit No. 4, is bound with a group of other papers, is that correct?

A. Would you repeat your question?

Q. I say this copy of Plaintiff's Exhibit No. 4 is included in a balance sheet of other papers?

A. Yes, sir.

Q. Were these prepared by you and transmitted to me? A. Yes, sir.

Q. Is there a date, a letter of transmittal?

A. Yes, sir.

Q. What is that date? A. May 25, 1954.

Q. In other words, would it be correct, Mr. Viray, to assume that the tentative balance sheet that you have been testifying from here was prepared prior to May 25, 1954? A. I believe so.

Q. Now, isn't it a fact that you prepared a later balance sheet than that particular one that is marked Plaintiff's Exhibit No. 4?

A. I say before I prepared two balance sheets only I do not remember if this one from which I

(Testimony of Ireneo Viray.)

have been testifying was the last one because the first one was only—— [67]

Q. I will show you an item that is labelled, "Island Service Company, Inc., balance sheet as of 29 September, 1952," and ask you if you prepared that? A. Yes, sir.

Mr. Crain: If the court please, I would like to have this marked Defendant's Exhibit A for identification.

The Court: Defendant's Exhibit A for identification?

Mr. Crain: Yes.

Mr. Turner: May I see it?

Q. (By Mr. Crain): Mr. Viray, there is attached to that a second page labelled, "Island Service Company, Inc., Profit and Loss Statement, January 1 to September 29, 1952." Was that an enclosure with this balance sheet at the time they were prepared? A. Yes, sir.

Q. They were prepared together, is that right?

A. Yes, sir.

The Court: You are merely asking now to have it marked as an exhibit? You are not introducing it?

Mr. Crain: Mr. Turner wants them separated but I prefer to keep them together.

The Court: Then it can be marked as an exhibit for identification only, consisting of two pages. If there is any question about it, the clerk will just staple both sheets. We have now reached the recess period. Are our accounts clear [68] as

(Testimony of Ireneo Viray.)

to what Mr. Viray is to do in getting records you need?

Mr. Turner: He is to get the first two schedules. Over here we have 3, 4 and 5. He wants to get Schedules 1 and 2. He says he knows what they are so he will go with Mr. Hines and get them.

The Court: Very well. Will counsel give the clerk all exhibits which have been introduced.

Mr. Crain: May we leave the books here under the cognizance of the clerk during the recess?

The Court: Well, I think you had better put them inside there. They may be perfectly safe in the open but you can't tell. Very well, the court will recess until 1:30 this afternoon.

(The court recessed at 12:00 a.m. and reconvened at 1:30 p.m., October 24, 1955.)

Mr. Crain: May we have Defendant's Exhibit 1 for identification, please, and——

The Clerk: Exhibit A.

Mr. Crain: That is right, and Plaintiff's No. 4.

Q. (By Mr. Crain): Mr. Viray, I would now hand you Defendant's Exhibit A for identification and ask you if this is a balance sheet prepared from the books of Island Service Company, Inc., as of 29 September, 1952?

A. Yes, sir.

Q. And was this prepared by you? [69]

A. Yes, sir.

Q. Did you also prepare the profit and loss statement that is attached to this?

A. Yes, sir.

(Testimony of Ireneo Viray.)

Q. And you attached the two together, is that correct? A. Yes.

Q. Now, this balance sheet bears the name "Viray" in the lower left-hand corner and the date June 23, 1954? A. Yes.

Q. Was that date placed there by you?

A. Yes, sir.

Q. So that this balance sheet was a later statement than the one you have testified on this morning, that is denominated—— A. Yes.

Mr. Crain: If the court please, I would like to introduce this in evidence as Defendant's Exhibit A.

The Court: Well, now, do you want to introduce this at this time or reserve it until you put on your own case?

Mr. Crain: It makes no difference.

The Court: Very well, it will be received without objection.

Mr. Turner: No objection.

Q. (By Mr. Crain): Now, Mr. Viray, there is considerable difference between Defendant's Exhibit A and Plaintiff's Exhibit [70] 4, is there not?

A. There are differences.

Q. Would you take the two and point out to the court the major differences and the major difference in the conclusion that you reached on the latest balance sheet?

Mr. Turner: May the witness be cautioned to refer to each exhibit so that the record will be clear?

Mr. Crain: Yes.

(Testimony of Ireneo Viray.)

Q. (By Mr. Crain): When you speak of this one, refer to Plaintiff's Exhibit No. 4 and this one as Defendant's Exhibit A.

A. Plaintiff's Exhibit 4 shows cash on hand of \$16,690.40 and Defendant's Exhibit A shows cash on hand in the amount of \$6,382.77. The difference is the amount of audit expense attached to it. When I say, "audit expense," it includes the salaries, I mean, the fees paid to consider and salaries paid to Mr. Perez. This difference was later objected to by Mr. Wiseman, contending that audit expense for a prior period should be charged to the current period.

Q. Before you go further, Mr. Viray, as one of the auditors, you felt that the procedure that you had taken here conformed to standard accounting procedure, is that right? A. Yes, sir.

Q. And that the audit expense should be charged back to the period of time that the audit covered?

A. According to accepted accounting methods Mr. Wiseman [71] was correct in charging the audit expense of a previous period to a current period; however, when I read over the agreement again, the agreement meant—at least it meant to me—that those should be charged to the previous period.

Q. In other words, that the parties that were involved should bear the expense in proportion to the interest that they had, is that right?

Mr. Turner: I object to that. In the first place,

(Testimony of Ireneo Viray.)

it doesn't state what the witness said and it calls for a conclusion.

The Court: Well, I understand. Go ahead.

Q. (By Mr. Crain): Go ahead, Mr. Viray.

A. Another major difference in these two exhibits is this: Plaintiff's Exhibit No. 4 shows general accounts receivable of \$64,576.91 and Defendant's Exhibit A shows the same accounts receivable in the amount of \$32,085.12.

The Court: 72?

A. \$32,085.12. This difference was bad debts that were written off. After conferring with Mr. Hines on this account, doubtful accounts receivable, he also agreed, after receiving proof that so many people did not want to confirm their account we——

Q. Before you go further, Mr. Viray, you were working quite closely with those old accounts receivable, were you not? You prepared letters of confirmation that went out to all of [72] those debtors requesting that they confirm the account or bring in substantiating data that they had paid those accounts, is that right?

A. That is right.

Q. What response did you have in your attempts to verify those accounts receivable?

A. We had several flatly deny the accounts and those others who were out of the island already and some accounts which they claim have already been paid.

Q. Who did they claim they had paid the money to?

(Testimony of Ireneo Viray.)

A. To the Island Service Company.

Q. Did they say they had paid the money to Island Service Company or to an individual?

A. I do not remember. I guess there was one, a particular one who said he paid his account to Mr. Perez. I just do not remember who that was.

Q. Mr. Viray, at the time you were conducting this audit were those accounts receivable reasonably current?

A. They were not current. The average ranged from five years, four years, three years.

Q. Actually, the accounts that you wrote off were written off by you according to conservative accounting procedure, were they not?

A. Yes, sir.

Q. And the figure that you have written off as shown in [73] Defendant's Exhibit A is actually a conservative write-off of those bad accounts, is it not?

A. When I made this judgment, sir, I made an explanation on my journal entry explaining that it was deducted entirely out of the accounts receivable with the proviso that in the event there will be one or two who would pay their account that they would be put back again.

Q. Yes, what I am getting at is in writing those accounts off, you were following conservative accounting practice, were you not, because of the age of the accounts and bad response that you had received from the debtors?

(Testimony of Ireneo Viray.)

A. Yes, I thought I was following good accounting procedure.

Q. Go ahead.

A. I guess those are the two major ones.

Q. Those accounts in a great part, then, form the ultimate difference here. On Plaintiff's Exhibit 4 you show an earned surplus to September 29, 1952, of \$61,228.67, is that right? A. Yes, sir.

Q. And on your subsequent balance sheet you show for the same figure, \$19,601.91; is that right?

A. Yes, sir, that is added to the capital earned.

Q. That is the earned surplus which was to be added to the capital, is that right?

A. That is right.

Q. Mr. Viray, is it correct that you were unable to conduct [74] a joint audit of the books of Island Service Company with Mr. Kaneshiro as the instructions which are contained in Plaintiff's Exhibit No. 2 called for?

A. I do not know if the audit was a joint audit. As soon as we started auditing, he made his audit and I made my audit. I mean, he worked alone and I worked alone, but we were working in one office at the same time.

Q. Is it true that he was working all the time you were making your audit?

A. He was working and I was working also.

Q. Was he working or just sitting there, Mr. Viray? A. I think he was working.

Q. During the period of over a year, is it your

(Testimony of Ireneo Viray.)

testimony that Mr. Kaneshiro was working, making an audit at that time?

A. I do not know; I was not particularly watching what he was doing. His work was spread on his table and I had mine on my table.

Q. Each of you conducted two separate audits during the period of a year?

A. Yes, sir, and came up with separate results.

Q. Were you aware that in the years prior to 1952 that the Government of Guam assessed income taxes against the corporation in excess of \$10,000?

A. I do not know what was the result. There was a tax deficiency. [75]

Q. That tax deficiency does not appear in either one of your balance sheets here, does it?

A. No.

Q. And that tax deficiency does not appear on Mr. Kaneshiro's balance sheet?

A. I do not know.

Mr. Crain: May I have Mr. Kaneshiro's? I think it is Plaintiff's Exhibit No. 3.

Q. (By Mr. Crain): Does that tax deficiency appear on Mr. Kaneshiro's balance sheet?

A. I do not think it does.

Q. Now at such time as that tax deficiency is taken up that would be an additional liability of the corporation, would it not, that would tend to reduce the earned surplus figure?

A. Yes, sir, Mr. Wiseman did that already in his adjustments.

Q. At the time that you began your audit, Mr.

(Testimony of Ireneo Viray.)

Viray, did you find there was a complete set of books for Island Service Company?

A. There were complete sets of books but I would not call them complete because some of them were not well done. For instance, the cash book—I found out that only total lump sums were posted in the cash book.

Q. Did you find any other deficiencies insofar as the completeness of the books were [76] concerned?

A. Well, in reconciling the cash receipts, less all cash disbursed, I found some differences.

Q. Were you and Mr. Kaneshiro ever able to resolve your differences?

A. I showed my results to him and he did not agree with me.

Q. On both Plaintiff's Exhibit No. 4 and Defendant's Exhibit A you have set out one item of heavy equipment as an asset at \$5,550. Do you recall what that heavy equipment consisted of?

A. Those were the same figures that I saw in the ledgers of Kaneshiro.

Q. Did that figure represent the purchase of 79 pieces of equipment from the Central Bank of China?

A. I believe so.

Q. Do you find that figure listed as such in Mr. Kaneshiro's balance sheet?

A. It should be here because the record shows that those equipment were entered in the books.

Q. Do you find any item in Mr. Kaneshiro's balance sheet where that figure could be buried?

(Testimony of Ireneo Viray.)

A. I would have no idea.

Q. Now, isn't it a fact that as a result of your auditing of these books you determined that the 79 pieces of equipment purchased by the corporation from the Central Bank of China [77] were separate and different from the pieces of equipment which were to be appraised by the appraisers chosen under the contract that is in question here?

A. I believe so. Those 79 pieces of equipment were a part of those appraisals.

Q. Some of them were? Isn't it a fact, Mr. Viray, that in the course of your audit that 49 pieces of that equipment had disappeared and they are not accounted for on the books of the corporation?

A. Well, in determining what we had sold and what was on hand there was a difference. There should have been more inventory than there proved to be.

Q. So, in other words, this figure you have in your balance sheet showing heavy equipment at \$5,550, that represents 79 pieces of equipment, if they were there, does it not? A. Yes, sir.

Q. And 49 of them were missing, isn't that correct?

A. I wouldn't say that exactly because there may be some more papers which I have not seen.

Q. In other words, in conducting your audit, Mr. Viray, you found much of your supporting data that you needed to make a complete audit missing?

(Testimony of Ireneo Viray.)

A. Most of the papers I wanted were missing.

Q. Did you ever find any of them?

A. No; all of the papers I discovered were missing, I never [78] found.

Q. So that there were large holes in this audit?

Mr. Turner: That is a leading question.

Mr. Crain: I have the witness on cross-examination.

The Court: He denied saying anything about large holes.

Q. (By Mr. Crain): Well, out of 79 pieces of heavy equipment purchased at \$5,550, 49 of them you never found any evidence that they existed, is that right?

Mr. Turner: He said he didn't know how many.

The Court: He testified that he would not draw that conclusion because there may have been equipment sold and so forth for which he didn't have the paper before him.

Q. You were never able to find the substantiating data for the sale of that major portion of that heavy equipment, is that right?

A. I will put it this way, sir, after trying to balance and while we were waiting for confirmation letters to arrive, I have plenty of time so I again checked this equipment—when they were purchased and how they were disposed of, so I wouldn't know; I did not make an official check-up; I only tried to find out.

Q. Now, Mr. Viray, this morning when Mr. Kaneshiro was testifying, he made the statement

(Testimony of Ireneo Viray.)

that he didn't know whether this audit was even complete as yet to this date and as far as he knew it might still be going on. Insofar as you are concerned, [79] have you completed your audit of the books of the Island Service Company?

A. I think I have completed mine.

Mr. Crain: I have no other questions.

Redirect Examination

By Mr. Turner:

Q. Mr. Viray, if I may refer you to Defendant's Exhibit A and Plaintiff's Exhibit 4, you have already testified that the main differences between these two audits are your statement of cash on hand of \$16,690.40 on Plaintiff's Exhibit 4 and \$6,382.77 in the balance sheet which is Defendant's Exhibit A, and I believe you testified that that represented a deduction from the cash on hand of the expenses of the audit, is that correct?

A. Yes, sir.

Q. Let me ask you, as an accounting principle, if you had \$16,690.40 on hand on 29 September, 1952, why would you deduct future expenses from the cash on hand?

A. Because on the basis of the agreement.

Q. I mean, why wouldn't you show it as a liability and still reflect the cash on hand as that actually there?

A. The cash on hand should be \$16,690.40.

(Testimony of Ireneo Viray.)

Q. It should be regardless of the fact that you put it \$6,382.77 on Defendant's Exhibit A?

A. Yes, I deducted from there so that Mr. Wiseman would [80] see if that would be pertinent.

A. I see. Your testimony is that the figure \$16,690.40 correctly reflects the cash on hand regardless of this balance sheet of June 23, 1954?

A. Yes.

Q. Let me also ask you, as an accounting principle, you have referred to the audit expense as expenses of Mr. Kaneshiro. That's payments made to him and those payments were all made subsequent to September 29, 1952?

A. That is correct.

Q. Isn't it true regardless of whether those expenses were incurred or set up on an accrual basis or cash receipts basis, it would not be a charge against the corporation until the month the services were rendered or cash paid to Mr. Kaneshiro?

A. According to accepted accounting methods that would be the correct procedure.

Q. In other words, anything in connection with the expense of the audit which was paid after October 1 would be reflected on the books of the corporation as of October 1 whether on an accrual or cash basis, is that correct? A. Correct.

Q. That also has another practical value that on September 29, 1952, you didn't know how much the audit expenses were going to be, did you?

A. No, sir, we had no idea. [81]

Q. So when you made this adjustment of

(Testimony of Ireneo Viray.)

\$6,382.77 you were adjusting back to September 29, 1952? A. Yes.

Q. So we are assuming this \$16,690.40 is correct? A. Yes.

Q. Wouldn't it hold that if there were any salaries paid to Mr. Perez after September 29, 1952, they would not be earned in the period for which the service had been rendered, right?

A. Right.

Q. And, if I remember, he was to receive a salary of a certain amount until the audit was completed? A. Yes, sir.

Q. So when you took the items off you were in fact deducting expenses that would, accountingwise, be approved in subsequent period?

A. (Nods head.)

Q. And am I also correct that in reconciliation with Mr. Wiseman you accepted his adjusting entries? A. Yes, sir.

Q. Now, turning to the figure for accounts receivable which on your statement of 6/23/54 you reduced from \$64,576.91 to \$32,085.12, is it not true that on the first statement, which is Plaintiff's Exhibit 4, you adopted the accounting procedure of listing the accounts receivable and taking a reserve for bad debts? [82] A. (Nods head.)

Q. But in the statement which is Defendant's Exhibit A you adopted another method of writing off accounts you felt to be bad and not using the reserve method, is that correct? A. Yes, sir.

Q. Now, this corporation was formed in Novem-

(Testimony of Ireneo Viray.)

ber, 1949? A. I think so.

Q. So that as of the 29th of September, 1952, a period would have elapsed of about three years, is that not also correct? A. Yes, sir.

Q. Let me ask you if for accounting purposes it is standard accounting custom and practice, according to accepted doctrine, to write off as a bad debt an account on which the statute of limitations has not passed?

A. Whenever we consider an account as having been refused or flatly denied—I do not believe the statute of limitations was involved.

Q. Well, let me ask you, Mr. Viray, I am interested in determining how you reached this figure of what to write off on June 23, 1954? What factors caused you to write particular accounts off from \$64,576.91 down to \$32,085.12?

A. I made an analysis of all accounts receivable, providing for columns, those who confirmed, those who did not and those out of town.

Q. Did you not testify on direct [83] examination that you just didn't hear from a lot of accounts—they just didn't answer confirming the account?

A. They did not want to confirm the account.

Q. I am trying to distinguish between those who refused to confirm the account and those who did not respond to the mail inquiries.

A. Some didn't respond.

Q. Have you any idea as to percentages of how many did not respond to your inquiries?

(Testimony of Ireneo Viray.)

A. I have no idea now but it should be in the records.

Q. Did you do these by accounts?

A. One by one.

Q. Is there anything over there that shows how you made these adjustments?

A. I believe I have a schedule.

Q. Will you kindly get your schedule, please?

A. This column shows the balance, this column shows they confirmed and the amount.

Q. Let's take the account of Agana Automotive Shop, \$282.

Mr. Turner: Your Honor, if there is no objection, I think I will introduce that into the record.

Mr. Crain: There is also a statement by him as to percentages. I want all of it. I object to that as not being all of the record. Don't you also have a statement reconciling these and showing the percentage of people contacted? [84]

A. I made it up but it is not there now.

Mr. Crain: Well, go ahead with that. Maybe we can find out.

Q. (By Mr. Turner): Let me ask you, Mr. Viray—I show you a nine-page document, all type-written, and ask you if this is the document which you used in determining that you would reduce the general accounts receivable from \$64,576.91 down to \$32,085.12, is that correct? A. Yes, sir.

Mr. Turner: All right. I will move to introduce this as Plaintiff's Exhibit next in order.

Mr. Crain: No objection.

(Testimony of Ireneo Viray.)

Q. (By Mr. Turner): Mr. Kaneshiro, I will ask you—I mean, excuse me, Mr. Viray, for income tax purposes two accounting methods are acceptable with reference to bad debts. One method is a reserve method and the other is an actual deduction of debts as they become bad in the particular calendar year, is that correct? A. Yes.

Q. I understand that the corporation was on the reserve method up until you made the audit which has been labelled Defendant's Exhibit A, June 23, 1954? A. Yes.

Q. The corporation up to that time had always been on the reserve method? [85] A. Yes.

Q. Now, isn't it true that after September up until the time you left the employ of Island Service Company, Inc., you continued on the reserve method? A. We do.

Q. So that the only time you shifted from the reserve method of accounting was on that financial statement of June 23, 1954? A. That is right.

Q. Let me ask you also, after Mr. Wiseman reconciled and set up a reserve for bad debts did the corporation continue to use the figure thereafter? A. Yes.

Q. I see. The corporation accepted Mr. Wiseman's reserve and utilized it thereafter while you were with the corporation? A. Yes.

Q. Now, let's take a particular item here, if we may—Agana Automotive Shop. This is Plaintiff's Exhibit 5, \$282. Your remarks and your code on the initial page shows that the confirmation letter

(Testimony of Ireneo Viray.)

was not returned to the auditors. What did you do with that item? Did you mark it off as a bad debt?

A. That is one of the bad debts I marked off.

Q. Isn't it true that every time the confirmation letter was not returned you marked it off as a bad debt? [86]

A. Yes, if I knew it was not returned.

Q. I have one more item, Guam Commercial Corporation, \$1,953.94; remarks, "CLNR," which means that the confirmation letter was not returned? A. Yes.

Q. Did you consider that a bad debt?

A. Yes.

Q. Isn't it true the corporation owed a lot of money at that time to Island Service Company?

A. Yes, and they him.

Q. Instead of offsetting, you considered this as a bad debt? A. Yes.

Q. But regardless of the finding of \$32,085.12, which you have testified constituted the first and only departure from the reserve method of accounting for accounts receivable of the corporation, you agreed in connection with Mr. Wiseman's reconciliation to restore the accounts receivable and start taking reserve for depreciation?

A. That is right.

Q. Now, there are a couple of other minor items on here, I notice. One is the amount of notes receivable which you have here on Plaintiff's Exhibit 4 as \$1,000, and you have it on this statement of

(Testimony of Ireneo Viray.)

June 23, 1954, as \$850. Can you explain that difference? [87]

A. This \$850 on Defendant's Exhibit A for notes receivable?

Q. Wasn't that the Henry Mar note?

A. No, sir, it is a different notes receivable in that amount. He claimed that he paid that \$1,000 already and I discussed that with Mr. Hines. Mr. Hines produced some receipts where he agreed to pay Mar's account because of so many other accounts. I had to write that off and put in another new one.

Q. And what is that note?

A. This \$850? I do not remember to whom it belongs, but it is not the same \$1,000.

Q. Do I understand, according to your testimony, Mr. Hines personally assumed the obligation to pay Mr. Mar the amount Mr. Mar owed the corporation?

A. Yes, sir, in such a way that the balance was to be deducted and two more accounts were involved.

Q. Had the corporation been paid yet that amount?

A. Well, you see, the time came when Mr. Hines was willing to pay Mar. There were accounts in the accounts receivable that were to be paid by Mar but those were accepted as a partial payment so that there was getting an amount less than those accounts that got involved in the transaction.

Q. Isn't it true that that transaction between

(Testimony of Ireneo Viray.)

Mr. Hines and Mr. Mar took place after September 29, 1952? A. No, I guess it was before. [88]

Q. But you didn't find out about it until the interval between the balance sheet of 29 September, 1952, and the one of June 23, 1954, which is Defendant's Exhibit A? A. Yes.

Q. Isn't it also true that in your conferences with Mr. Wiseman, that is the conferences between Mr. Kaneshiro and yourself, all of the differences between the balance sheet of 29 September, 1952, and the one of June 23, 1954—the major differences which you have discussed and testified to—they were resolved and reconciled? A. Yes, sir.

Q. And you accepted Mr. Wiseman's adjustments to both your balance sheet and Mr. Kaneshiro's balance sheet? A. I did.

Q. Now, just to clear up a minor item, you said that you and Mr. Kaneshiro conducted your audits together? A. He did his separately.

Q. They were both in the same physical location and they went on at the same time chronologically speaking? A. Yes.

Q. Isn't it true he and you discussed certain items and agreed upon them, such as inventory of merchandise?

A. We discussed various items and agreed on some and some we didn't.

Q. Now, wasn't it also true that referring to the joint [89] instructions of Mr. Crain and myself, which I think is Plaintiff's Exhibit 1—

The Clerk: 2.

(Testimony of Ireneo Viray.)

Q. (Continued): 2 and which formed the basis for your audit, the rolling stock, mechanical equipment and fixtures—the value of them was to be fixed by appraisal? A. Yes.

Q. Accordingly referring to the values of fixed assets set forth by you in Plaintiff's Exhibit 4, namely, heavy equipment, automotive equipment and shop equipment, you previously testified that that was the value of that equipment as it was shown on the books of the corporation?

A. Yes.

Q. And that is true also with respect to Defendant's Exhibit A where you have the same value and the same titles on each of those items?

A. Yes.

Q. Under the joint instructions received from Mr. Crain and myself, isn't it true that the values you put on those assets were the appraised values?

A. Yes.

Q. So in accordance with the instructions these values would not be on there—that is the cost value, but you put the appraised value, is that right?

A. That is right, you said the book value. [90]

Q. And the net capital minus the liabilities would be increased or decreased according to whether it was higher or lower than the cost figures you have in here? A. (Nods head.)

Q. Now also on your Plaintiff's Exhibit 4 you showed an earned surplus from January 1, 1952, to September 29, 1952, of \$22,334.74. On Defendant's Exhibit A, which is your balance sheet of 6/23/54

(Testimony of Ireneo Viray.)

you show a loss of \$30,670.96. Now, isn't it true, looking at the profit and loss statement, that the reason for that difference is that you took off bad debts of \$36,944.24? A. Yes, sir.

Q. And if you took the reserve method of bad debt accounting that item would have to come out of there, wouldn't it? A. Yes.

Q. If it was taken out of there it would mean a reduction in the profits? A. (Nods head.)

Q. And is it also true that you took as an expense for the period from January 1 to September 29, 1952, as an operating expense, the expense of an audit which occurred after that period, and that you would have to take that figure out of \$58,000, considerably increasing the cost for the period and reducing the profit?

A. (Nods head.) [91]

Q. And I believe you also testified that for purposes of this audit, the net worth of the corporation, assuming that you did not have a surplus which occurred through revaluation of the equipment, would be the assets minus the liabilities minus the capital account—the result would be the earned surplus? A. (Nods head.)

Q. So that using the method of setting up a reserve for accounts receivable you would end up with a surplus for the entire period, is that correct? A. Correct.

Mr. Turner: That is all.

(Testimony of Ireneo Viray.)

Q. (Continued): 2 and which formed the basis for your audit, the rolling stock, mechanical equipment and fixtures—the value of them was to be fixed by appraisal? A. Yes.

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Q. So that using the method of setting up a reserve for accounts receivable you would end up with a surplus for the entire period, is that correct? A. Correct.

Mr. Turner: That is all.

(Testimony of Ireneo Viray.)

Recross-Examination

By Mr. Crain:

Q. You have agreed with Mr. Turner that most of the items contained in your balance sheet of June, 1954, should be deleted, but after all the audit expense would fall into a very similar category with the additional taxes owed the Government of Guam for the period 1951 and 1952, would they not? A. I believe so.

Q. And would you say because the Government of Guam——

The Court: I am not following that.

Mr. Crain: Well, it is a similar analogy to these Mr. Turner has been drawing.

The Court: It isn't an analogy at all if you are talking about an additional liability incurred subsequent to—— [92]

Mr. Crain: It was a liability which was not owing September 21, 1952.

The Court: It was owing at the time the audit was made. The other amount was not owing until after the date of the audit.

Mr. Crain: The audit was of benefit to all of the parties to the transaction.

The Court: Well, it may be subject to certain ramifications.

Mr. Crain: That is right. This isn't an audit in the normal course of business as Mr. Turner has tried to slant it in his questioning.

(Testimony of Ireneo Viray.)

The Court: Well, it is a question whether the parties to this action owe it. It has nothing whatever to do with the status of what is due as of September 20, 1952.

Mr. Crain: It does insofar as the ultimate figures that we are going to arrive at. It is going to be the basis of the payment.

The Court: If you are going to talk about a balance sheet of June, 1954, that is one thing, but you are talking about a balance sheet of September 30, 1952.

Mr. Crain: Well, you have a matter of taxes which didn't appear until 1954.

The Court: Taxes were owing?

Mr. Crain: No, but when they appeared on the balance sheet—— [93]

The Court: If they were due they should have been.

Q. (By Mr. Crain): You testified as to accounts receivable and your method of handling them. Refresh your memory with this document. Can you find in the books of the company this same statement as to the percentages of persons you were able to contact for the purpose of verifying the accounts receivable?

A. I do not have it in the books—the total amount was.

Q. This accounts receivable was prepared by you, is that correct? A. It was.

Mr. Turner: Your Honor, I will stipulate with counsel for defendant that he is questioning Mr.

(Testimony of Ireneo Viray.)

Viray with reference to a schedule 3, accounts receivable, which was a part of the working papers in connection with Mr. Viray's audit and that a carbon copy of that may be prepared and inserted in the record.

Mr. Crain: As Defendant's Exhibit 2.

The Court: Very well.

Q. (By Mr. Crain): Mr. Viray, will you read Section 3 into the record?

A. Section 3, accounts receivable; total of accounts receivable as of 29 September, 1952, was \$64,576.91. Confirmation letters were sent out with a view to verifying individual balances and as of October 29, 1952, after a period of thirteen months, the standing of the accounts receivable was as follows: [94] Balance, September 29, 1952, \$64,576.91; payments made between September 29, 1952, and October 29, 1953, \$11,918.72; balance October 29, 1953, \$52,658.19. Above balance analyzed as follows: Accounts confirmed but not yet paid, \$4,605.68; confirmation letters not yet returned up to October 29, 1953, including those who refused to confirm balances alleging that their accounts have already been paid to Joaquin A. Perez, those that could not be located and those that definitely left the island, \$48,052.51.

Q. That is section 3, is that right?

A. That is right.

Q. Now according to that statement which you made, a number of these accounts—the customers

(Testimony of Ireneo Viray.)

verified them by saying that the accounts had been paid to Mr. Joaquin A. Perez, is that correct?

Mr. Turner: I object to that. He testified in his direct testimony there was one man.

The Court: He said there was one man; he didn't know who he was.

Mr. Crain: Here he says it in the plural.

Mr. Turner: No, that is the cumulative.

Q. (By Mr. Crain): Actually, Mr. Viray, most of the confirmation letters that you sent out in attempting to deliver them, some of them were hand-delivered, were they not? A. Yes.

Q. Mr. Turner examined you about the reduction of cash on hand from \$16,690.40. You explained the reason why you had done that and then agreed that it had been improper. However, [95] approximately \$10,000 of that consisted of fees paid to Mr. Kaneshiro and salaries paid to Mr. Perez and which are actually a liability upon the books of the corporation, are they not?

A. That is right, sir.

The Court: Now, just a moment. We are getting confused. They were not a liability on the books of the corporation as of September 30, 1952.

A. They were not a liability on September 30, 1952.

The Court: Exactly, your contract provides that as of October 1 your assets and liabilities are to be determined as of October 1. Consequently any debts which occurred subsequent to October 1 could not

(Testimony of Ireneo Viray.)

properly be included in the determination of the assets and liabilities.

Mr. Crain: Unless it is the court's contention that Mr. Perez should be paid twice, that he should be paid money for doing nothing and then 25 per cent of that——

The Court: I am not concerned with whether Mr. Perez should be paid or shouldn't be paid. We are trying to strike a balance here and your agreement says through October 1. That is as far as I go.

Q. (By Mr. Crain): Mr. Viray, Mr. Turner used the Guam Commercial Corporation of the accounts receivable and questioned you for your reasons for not offsetting a debt of the Guam Commercial Corporation as against one owed to Island Service. Now is that good accounting practice to wipe one out against [96] the other?

A. Well, see, it is like this: This Guam Commercial I wrote off because I believe, if I remember correctly, it was not confirmed and was said to have been paid. I do not exactly remember but there must have been some reason why I did that. I discussed it with Mr. Hines.

Mr. Crain: I have no more questions.

Redirect Examination

By Mr. Turner:

Q. What did you do? You just wrote off every account if the fellow didn't acknowledge he owed you?

A. You see, before I——

(Testimony of Ireneo Viray.)

Mr. Crain: I object to that.

The Court: He is entitled to ask him the question.

Mr. Crain: That is not a question. He is arguing.

The Court: He is asking whether he consulted with Mr. Hines about writing off bad debts. It is at the time when he had exclusive control of the books and the business?

A. Yes.

Mr. Crain: You mean you were influenced by Mr. Hines and not sound accounting procedure?

Mr. Turner: I object.

The Court: Mr. Crain wants to know whether Mr. Hines told you what to do or was it because of good accounting procedure? [97]

A. No, we discussed this accounting procedure together and I asked him if I should write him off and he said "yes" so we write him off with the provision that if anybody pays we would put him back.

Mr. Crain: Is that sound accounting procedure in view of the age of these accounts?

A. If we follow accounting procedure we will make a reserve for these doubtful receivables when we write them off.

Q. (By Mr. Turner): I would like to ask one question. Even though you wrote them off on Defendant's Exhibit A, you carried the account on a reserve basis after that?

A. After that, yes.

(Testimony of Ireneo Viray.)

The Court: Now as I understand it you went over your list of accounts receivable. You sent out letters asking individuals to confirm the account. If they did not confirm the account you charged it off as a bad debt?

A. That is after making the agreement with Mr. Hines.

The Court: Let me direct your attention to an account here—Corn and Murray, address, Ipao; account started March 13, 1952. The amount of the debt is \$4,346.65. You have marked on your list here “CLNR” to mean that the collection letter was not received.

Mr. Crain: Returned.

The Court: Now does that mean that this \$4,346.65 was then charged off as a bad debt on your books? [98]

A. Yes, it was charged as a bad debt on the books because after examining all of the invoices supporting this account, no one invoice was signed by Corn and Murray.

The Court: But you didn't—you say the invoices were not signed by Corn and Murray? Was this not turned over to anybody for collection? Did no one contact either Mr. Corn or Mr. Murray to find out about it?

A. Mr. Hines can better answer that.

The Court: So far as you knew you took this item of \$4,346.65 owed by a well-known firm and just wrote it off as a bad debt?

A. That is the way it appears, sir.

(Testimony of Ireneo Viray.)

Mr. Crain: May I clarify that, your Honor, please?

The Court: Of course.

Recross-Examination

By Mr. Crain:

Q. Mr. Viray, do you remember in the course of this audit there was one item of \$1,500 that was supposed to have been paid by Corn and Murray against that account and another item that was supposed to have been paid against that account which cannot be verified?

A. That was not in the books at all. It was only information received by us from Corn and Murray that they paid Mr. Perez \$1,500, but it was not in the books. [99]

The Court: That still left \$2,800.

Q. (By Mr. Crain): You did not find that entry at all? A. No, sir.

Mr. Crain: I can't testify at the moment but it can be explained.

Mr. Turner: Isn't it true that as far as the assets and liabilities are concerned you still have \$1,500 due?

A. I cannot answer that question because I do not know whether the information is correct or not.

Mr. Turner: What I mean is you wrote it off as a bad debt.

The Court: Here is an item here, Jose S. Camacho, \$6,875.60. Did he pay?

A. We did not write that off, sir.

(Testimony of Ireneo Viray.)

The Court: You charged it here. Did he afterward pay the amount?

A. He is paying it every month.

Mr. Turner: Did you write that off, too?

A. No, sir.

The Court: Now, as I understand it—Guam Commercial Corporation—your books showed that they owed you and that you owed them. Now isn't it proper in accounting practice for you to credit your books with the amount you owed them and send them a receipt for it?

A. That is proper, your honor, but as I say before, I gave [100] this list to Mr. Hines and we discussed it.

The Court: Then is it your statement that Mr. Hines told you to do things which were not good accounting practice?

A. In this particular case?

The Court: As regards the wiping off of bad debts he told you to do things that you would not do in accordance with good accounting practice?

A. It appears like that, sir.

The Court: Very well. Questions?

Mr. Crain: No questions.

Mr. Turner: That is all.

The Court: He said he did these things because Mr. Hines told him to do them and that it wasn't good accounting practice to do it.

Mr. Turner: I have no further questions.

The Court: You may step down, Mr. Viray.

Mr. Turner: Sherwood Wiseman.

MR. SHERWOOD WISEMAN

called as a witness by the plaintiff, was duly sworn and testified as follows:

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address.

A. Sherwood Wiseman, Maite, Barrigada.

Q. What is your occupation, Mr. [101] Wiseman?

A. Accountant.

Q. By whom are you employed?

A. Jones and Guerrero.

Q. And what is your duty at Jones and Guerrero?

A. Chief accountant for Jones and Guerrero.

Q. How long have you held that position?

A. A little over two years.

Q. In the course of your duties with Jones and Guerrero do you have any other accountants or bookkeepers under your supervision?

A. Yes, I have about 15.

Q. And prior to your employment by Jones and Guerrero by whom were you employed?

A. The Government of Guam.

Q. In what capacity?

A. Chief accountant.

Q. And how many accountants and bookkeepers did you have under your direction at that time?

A. Oh, I would say approximately 35.

Q. Mr. Wiseman, were you requested to attempt to reconcile differences in audits conducted

(Testimony of Sherwood Wiseman.)

by Mr. Stanley Kaneshiro and Mr. Viray in connection with Island Service Company?

A. Yes.

Q. And did you, as a result of that request, meet with Mr. Kaneshiro and Mr. Viray for the purpose of reconciling their [103] audits?

A. Yes, I did.

Q. Now in preparation for that reconciliation were you delivered any documents such as an agreement between Mr. Joaquin Perez and Mr. Hines and any other documents?

A. Yes, there was an agreement signed by Perez and Hines and also I had balance sheets submitted by Kaneshiro and Viray.

Q. Now did you familiarize yourself with those documents prior to having the meetings with Mr. Kaneshiro and Mr. Viray?

A. Yes.

Q. And how many meetings did you have with these two gentlemen, that is Mr. Kaneshiro and Mr. Viray?

A. Well, I think I had about five all told.

Q. Where were those meetings held?

A. Well, some of them were held in your office, some of them were held at the office of Jones and Guerrero.

Q. Isn't it true, Mr. Wiseman, that at the meetings held at my office or Jones and Guerrero there was no one present but Mr. Kaneshiro and Mr. Viray?

A. That is right.

Q. They were private, closed meetings?

A. Yes.

(Testimony of Sherwood Wiseman.)

Q. As a result of those meetings did you make any adjustments to Mr. Stanley Kaneshiro's balance sheet of the assets and liabilities, net worth and surplus, of Island Service Company, [103] Inc., as of 29 September, 1952? A. Yes.

Q. Did you make any adjustments in the balance sheet of Mr. Ireneo Viray of September 30, 1952?

A. Yes.

Q. Mr. Wiseman, I will show you two exhibits, one marked Plaintiff's Exhibit 4 and one marked Defendant's Exhibit A, which are two balance sheets prepared by Mr. Viray. You will note that they are both as of September 29, 1952, but they contain some different data. Will you state to the court, if you can, which of these balance sheets was given to you by Mr. Viray for the purpose of making any adjustments? A. Can I—

Q. Yes, if you have some working papers, you may refer to them.

A. I think this is the one. (Indicating.)

Q. In other words, you feel that whatever adjusting entries you made were to Defendant's Exhibit A? A. Yes.

Q. I just want to get the record clear on that point. Will you kindly state, Mr. Wiseman, what adjusting entries you made? May I ask if you brought your original report to the court in connection with these entries? A. Yes.

Q. Will you refer to whatever working papers you require [104] and state the adjusting entries you made to each of the auditor's balance sheets?

(Testimony of Sherwood Wiseman.)

A. Well, to Kaneshiro's balance sheet I made six adjusting entries.

Q. Would you kindly state what they are?

A. The first adjustment was to adjust accounts receivable to agree with the detail of the accounts receivable that was applied by Viray.

Q. What would that adjustment consist of?

A. Well, the effect was to reduce the accounts receivable, the control.

Q. Now you are talking just about Mr. Kaneshiro's accounts receivable? A. Yes.

Mr. Turner: Perhaps the court would like to have Mr. Kaneshiro's balance sheet?

The Court: Well, I have it roughly in mind. His accounts receivable shows roughly something like \$69,000 and a reserve for bad debts.

Q. (By Mr. Turner): How much of an adjustment did you make?

A. I adjusted it \$1,245.26.

Q. Downward? A. Yes.

The Court: What balance did that leave, Mr. Wiseman? [105]

A. Well, there were two subsequent debits to the accounts receivable control which left an adjusted balance of \$70,021.98.

The Court: How much?

A. \$70,021.98.

The Court: Without reference to the reserve?

A. Yes, sir.

Q. (By Mr. Turner): What is your next ad-

(Testimony of Sherwood Wiseman.)

justment in connection with that? We will go ahead. You take it in the order that you have it.

A. The next adjustment was relative to the reserve for bad debts. I increased the reserve for bad debts by \$9,889.37.

Q. Now that is the agreed reserve? Each of them, I believe, used the same figure for reserve, \$6,583.87? A. Yes.

The Court: You increased that to \$16,000?

A. Yes, sir.

Q. (By Mr. Turner): Mr. Wiseman, excuse me—I want to ask you—referring again to Defendant's Exhibit A and Plaintiff's Exhibit 4, you might have been working off of Plaintiff's Exhibit 4 because there is no reserve for bad debts on Defendant's Exhibit A?

A. In my worksheets I don't have any reserve for Viray either. I adjusted later on.

The Court: I would like to have the net on accounts receivable after setting up the reserve for bad debts. It would [106] be roughly \$54,000?

A. Yes, sir, \$53,548.74.

The Court: Do you consider that an adequate reserve in Guam for debts of this character?

A. Well, I had no way of knowing. I didn't know how much work had been done relative to trying to collect the accounts receivable. The statute of limitations hadn't run on a lot of these and I just assumed, after talking with Viray and Kane-shiro, at least some work could be done on the re-

(Testimony of Sherwood Wiseman.)

ceivables that hadn't been done before. I was led to believe that.

The Court: Your reserve was roughly 23 per cent?

A. Yes, sir.

Q. (By Mr. Turner): Was that increase in reserve accepted by Mr. Kaneshiro and Mr. Viray?

A. Yes, I think it was.

The Court: What figure do you recite?

Mr. Turner: Well, he used that \$70,000 figure less the reserve; that is where he get a net figure of \$53,548.74, isn't that correct?

A. Yes, sir.

Q. What is your next adjusting entry for Mr. Kaneshiro?

A. Let's see—I adjusted merchandise in transit of Kaneshiro's by \$10,132.19.

Q. Is that Kaneshiro?

A. Yes, and the offset credit to that was to drafts payable [107] of \$10,132.19.

Q. I see. The draft would come in and you increased the amounts of drafts payable and the amount of the merchandise in transit offsets the liability?

A. Yes.

Q. OK?

A. I adjusted the accounts receivable upward \$500 to take care of the account of Felix Torres Triangle Store.

Q. I see. Now just to save time, is that a situation where a check had been given to an employee I mean gone through Felix Torres' store and they

(Testimony of Sherwood Wiseman.)

had forgotten to stop payment on it and it was cashed twice? A. Yes.

Q. What is the next one?

A. I made an adjustment increasing accounts receivable again by \$1,000 and the offset to that was to notes receivable; in other words, it was merely a reclassification of an item from accounts receivable to notes receivable.

Q. It didn't affect the balance sheet?

A. No, it had no effect.

Q. Next?

A. I increased notes receivable \$850 to bring on the books a note from Juan M. Santos.

Q. Had that previously been on the books at all?

A. No, I don't think so. [108]

Q. All right, your next one?

A. The next one—I decreased accounts payable by \$318.50, which represented an item supposedly due Bart Pugh and after discussing this item, we determined that it was not collectible. In other words, there wasn't enough for him to substantiate the item. The next adjustment was \$348 to adjust cash on hand as of the balance sheet date.

Q. What did that represent?

A. My note says "cash chits turned over to Mr. Hines on balance sheet date," and this item was agreed upon by Kaneshiro and Viray both. Adjustment No. 9 was to increase the reserve for income taxes by \$10,903.79.

Q. What did that represent?

(Testimony of Sherwood Wiseman.)

A. To cover the tax deficiencies, penalties and interest for the tax years '51 and '52.

Q. Do I understand that you had checked with the tax authorities and they had made an assessment?

A. I didn't get anything in writing from them. I applied for it and they never replied to my request.

Q. This figure represents the amount you were orally told?

A. Yes. That is all the adjustments I made on Kaneshiro's balance sheet.

Q. Would you go ahead with Viray's adjustments?

A. All right, the first adjustment was debiting cash on hand [109] for \$397.73. That represented a difference on taxes, withholding taxes of \$172.13 and another adjustment for \$100, which made a total of \$272.13.

Q. Were those withholding taxes that he had withheld but not reflected in cash?

A. That is the \$272.13. There was another adjustment for \$100.60 relative to additional withholding taxes and a \$25 item for petty cash that was on hand, making a total of \$397.73. Adjustment 2, I set up prepaid expenses, \$545.28. It wasn't on Viray's balance sheet.

Q. But they were actual prepaid expenses?

A. Yes.

Q. They were agreed to by Mr. Viray and Mr. Kaneshiro?

(Testimony of Sherwood Wiseman.)

A. Yes, sir. Adjustment No. 3 I increased accounts receivable of Mr. Viray's figures by \$36,436.86.

Q. In other words, to restore to the full accounts receivable and take out the reserve for bad debts?

A. Yes, that is exactly what it was. The fourth adjustment, I set up a reserve of \$16,473.24.

Q. For the accounts receivable?

A. Yes, that reserve then tied in with the adjustment of the reserve Kaneshiro had. Adjustment No. 5, I increased the figure for the buildings, \$4,366.59, to bring the buildings into agreement with what Kaneshiro had and this was also agreed [110] upon.

Q. By Mr. Viray? A. By both.

Q. In other words that represented the agreed figure of both of them as to the value of the buildings?

A. Yes. Adjustment 6 I decreased the reserve for depreciation by \$7,004.08 because we were going to——

Q. Let me ask, Mr. Wiseman, was that to offset out the depreciation on the machinery which was to be appraised?

A. Well, it covered the heavy equipment, automotive and shop equipment, and the net was \$7,004.08. These items would depreciate, but according to the agreement they were to be valued at a certain date, which would have nothing to do with depreciation. Item 7, I increased the equipment

(Testimony of Sherwood Wiseman.)

account by decreasing heavy equipment by \$5,550, decreased automotive equipment by \$5,200 and decreased shop equipment by \$1,695. A portion of this is reclassification into something comparable to what Kaneshiro had, just classification of items.

Q. Let me ask you—in that adjusting entry you took out the cost and depreciation basis for that heavy machinery and so on and made adjustments for the appraised value of it? A. Yes.

Q. But if the actual figure determined as to the value is different from your adjusting entry that would either increase or decrease the surplus?

A. Yes. Adjustment 8, I brought on Viray's balance sheet \$10,132.19, which represented merchandise in transit. This is [111] comparable to adjustment No. 3 in Kaneshiro's adjustments. Item 9—I set up a suspense account of \$500 and credited an account called J. A. Perez clearing account. This was to reverse the entry that Viray had made and the reason for that was that on the duplicate check that we talked about before the \$500 was involved in that and we set it up in a suspense account until it could be cleared away. Adjustment No. 10, I increased accounts receivable by \$500, which is the Felix Torres receivable. Adjustment No. 11, I increased cash on hand by \$10,307.63 and I debited sundry accounts payable \$4,113.40, credited salaries and wages \$6,000 and credited audit expense, \$8,408.53.

Q. Let me ask this—this restoring of cash of \$10,307 is to restore Mr. Viray's cash on hand

(Testimony of Sherwood Wiseman.)

figure to the amount that was actually on hand of \$16,690.40? A. You mean \$10,307.63?

Q. Yes, that restored the \$16,690.40?

A. Yes, that is right.

Q. Let me ask you why did you set up the audit expense as a liability, or did you do that?

A. No, I wiped it out.

Q. All right, what is your next item? Was that on the basis that that was not a liability as of October 1, 1952?

A. I did not consider it so. Adjustment No. 12, I set up an item of suspense of \$3,206.03 and credited sundry accounts [112] payable. This adjustment reversed adjusting entry No. 12 of Viray's. This was my comment here: Mr. Viray made this entry on the premise Mr. Hines points out that to the best of his recollection the company does not owe Perez any amount for coral unless proven otherwise. The account was already on the books and normally I couldn't see why it should be taken back out. Just because I restored it again doesn't mean I approved the account.

Q. Viray had no basis for removing the account?

A. No. No. 13, I set up and credited J. A. Perez clearing account for the same amount. That again was a reversing entry of an entry made by Viray where I didn't think he had sufficient basis for doing so.

Q. Let me ask you—isn't it true that even with that clearing account in there it doesn't affect the net worth and surplus of the corporation because

(Testimony of Sherwood Wiseman.)

with a clearing account on the expense account you have the same item both on the assets and liabilities side, so taking it out didn't change it?

A. No, merely classified it.

Q. Any more adjusting entries?

A. No. 14. I made a credit to a suspense account for \$14.03 to set into suspense an error between the detail and control that Viray had. No. 15, I set up an accounts receivable for Cristobal Hines for \$1,000 and credited Cristobal Hines for \$1,000, which is really an accounts receivable. It is [113] just a reclassifying entry. Adjustment 16 was for \$14.02 crediting Cristobal C. Hines which deleted the account. There was no basis for the \$14.02. Adjustment 17. I decreased accounts payable by \$2,296.03, which took out of the accounts payable, or adjusted the accounts payable to Perez relative to some coral. The unit price was wrong the way it was originally set up.

Q. Oh, I see—in computing liability you found the wrong unit price had been used and it was necessary to adjust it?

A. Adjustment 18, I credited cash on hand \$348 to bring that into agreement with the adjustment I made on Kaneshiro's balance sheet. Adjustment 19, I set up a reserve for income tax for \$10,903.79.

Q. Is that in addition?

A. No, this is on Viray's balance sheet and the other entries are on Kaneshiro's balance sheet. When I made an adjustment on one balance sheet I made a counter entry on the other one to keep

(Testimony of Sherwood Wiseman.)

them in agreement all the way through. That is all the adjusting entries.

Q. Now after you made those adjusting entries did you prepare comparative balance sheets showing those adjustments? A. Yes, I did.

Q. Would you kindly just pull that out?

Mr. Turner: Would you mark this Plaintiff's Exhibit next [114] in order for identification?

The Court: No. 6.

Q. (By Mr. Turner): Did Mr. Kaneshiro and Viray accept all of those adjusting entries?

A. I think they did, yes.

Q. I show you a document marked Plaintiff's Exhibit 6 and ask you if you recognize that?

A. Yes, it's the balance sheet I prepared from these adjustments.

Q. Does this therefore represent the comparative balance sheets of Mr. Viray and Mr. Kaneshiro with the adjustments thereto that they agreed to?

A. Yes.

Mr. Turner: Mr. Crain will ask a question voir dire before——

The Court: I think we will take a 15-minute recess at this time.

Mr. Turner: Mr. Wiseman has a ship leaving. I thought maybe if Mr. Crain—he is supposed to sign a document—I think we could finish with him in four or five minutes and not delay him.

Mr. Crain: No, I think it will take longer.

Mr. Turner: It will foul you up. When does your ship leave?

(Testimony of Sherwood Wiseman.)

A. 5 o'clock. I have to be there an hour and a half ahead.

Mr. Turner: A ship is leaving and he is the only one [115] authorized to sign the document to clear it out.

The Court: Well, he mentioned an hour and a half. I think Mr. Wiseman should be excused until 9:30 tomorrow morning and you understand, of course, that your exhibit is not admitted until after cross-examination and then you can continue your cross-examination until we meet again. I think you have evidence, do you not, on inventory and so forth?

Mr. Turner: Yes, I can put that on.

The Court: So you run along, Mr. Wiseman, and be in court at 9:30 tomorrow morning.

(The court recessed at 3:15 p.m. October 24, 1955, and reconvened at 3:30 p.m. October 24, 1955.)

Mr. Turner: If the court please, I want to clear up one item so I don't forget it. It is my understanding that the agreement called for the fact that Crain and Phelan and L. Turner were to reconcile the differences after an audit. It is my understanding that no reconciliation is possible.

Mr. Crain: That wasn't my understanding.

Mr. Turner: The only difference is that I would have to get on the stand and testify that it is my understanding you stated at the pre-trial conference there was no agreement to any item.

Mr. Crain: My contention is that I said there was never any attempt at any agreement.

The Court: Well, there was no agreement and the entire [116] contract was in dispute.

Mr. Turner: That is what I understood and I have been unable to reconcile with Mr. Crain. All right, call Mr. Forkner.

MR. SPENCER M. FORKNER

called as a witness by the plaintiff, was duly sworn and testified as follows.

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address.

A. Spencer M. Forkner, Maite, Barrigada.

Q. What is your occupation, Mr. Forkner?

A. Equipment and salvage dealer.

Q. How long have you been so engaged?

A. Fifteen years.

Q. During the course of your occupation for the last 15 years have you had occasion to buy and sell heavy equipment? A. I have.

Q. Has that been in the territory of Guam?

A. Yes.

Q. State approximately how many items of heavy equipment you may have purchased and sold in the territory of Guam during the period you have been here. A. 1,200.

Q. And over what period has that [117] extended? A. Five years.

(Testimony of Spencer M. Forkner.)

Q. Have you also appraised the value of items although you have not actually purchased them?

A. I have.

Q. And that is in excess and beyond the 1,200 pieces you testified you bought and sold?

A. That is right.

Q. Now in appraising the value of a piece of heavy equipment or rolling stock what price do you——

The Court: I wonder—I don't like to interrupt—but I wonder if Mr. Forkner would define for us just what is meant by "heavy equipment"?

A. Anything above a two-and-a-half-ton truck.

Q. (By Mr. Turner): And what would the definition of rolling stock be separate from heavy equipment?

A. Well, rolling stock is usually trailers, trucks, graders, anything that moves on rubber.

Q. And rolling stock may also be heavy equipment?

A. It can be, yes. You can call a bulldozer rolling stock. Many times it is called that.

Q. Is there such a term as light equipment for anything below two and a half tons?

A. Usually pickups are considered light equipment.

Q. In appraising the value of both heavy and light equipment how do you compute the price or value? [118]

A. Well, usually, on the market condition,

(Testimony of Spencer M. Forkner.)

whether it is useable or whether it can be used for parts.

Q. Mr. Forkner, did you have occasion some time in the year 1953 to appraise certain heavy and light equipment of Island Service Company, Inc.?

A. I did.

Q. Now in connection with making that appraisal you gave them instructions on how the appraisal was to be made?

A. Well, the only instruction was what it was worth at the time.

Q. At what time?

A. At the time when we made the appraisal.

Q. From whom did you get these instructions?

A. I believe Mr. Crain is the one that asked me to make the appraisal.

Q. Do you know whether you were requested to make your appraisal as of October 1, 1952, or as of the date you made the actual appraisal?

A. I don't recall now, Mr. Turner.

Q. In connection with any appraisal that you made can you tell me whether it was as of the date of your appraisal or as of October 1, 1952?

A. It was the date of my appraisal.

Q. From your knowledge and experience, taking into consideration the depreciation or where it would be during the [119] period from October 1, 1952, to the date of your appraisal, would you say that your appraisal would be higher or lower, taking into consideration also the market from October 1, 1952?

(Testimony of Spencer M. Forkner.)

A. There would be very little difference—about the same.

Q. I show you a three-page document and ask you if you recognize it?

A. It appears to be the appraisal that I made.

Q. From your recollection this is your appraisal?

A. That is right.

Mr. Turner: May it be admitted without objection, your Honor?

The Court: Very well, it will be received.

Mr. Turner: Plaintiff's Exhibit next in order. Your Honor, by the time court meets tomorrow morning counsel and I will check the total amount.

Q. (By Mr. Turner): Mr. Forkner, I am going to give you Plaintiff's Exhibit No. 7 and ask you where the material or items were that you appraised? Do you remember where they were located?

A. They were at the Island Service yard at Tamuning.

Q. And were all of them there or some of them?

A. As I recall they were all there to the best of my knowledge. I am sure that they were all there.

Q. Is it possible that some of them could have been out [120] at the coral pit?

A. I don't recall right now, Mr. Turner.

Q. And this estimate of the value represents what you considered to be the market value of each item of equipment?

A. That is right, either as useable or as parts.

Q. And how much of an inspection did you make of each item from your recollection?

(Testimony of Spencer M. Forkner.)

A. Well, I spent most of a whole day on it.

Q. Now I am referring to—let's take an item—this bulldozer TD18—referring to the fourth item down on your appraisal, TD18 bulldozer—

A. Yes.

Q. You appraised it at \$3,000?

A. That is right.

Q. What particular factors, if you remember, caused you to fix that price of \$3,000? Do you remember the condition of it?

A. Yes, it was not in operating condition. The rear pinion in the rear end was gone and it was disassembled and that is why it was not worth any more.

Q. If it had been in operating condition how much would you have appraised it?

A. At the time about \$4,500.

Q. Would you under any circumstances have considered that \$500 was the market value of that piece at that time? [121]

A. At that time I would say it was worth more than that.

Q. You would have been willing to pay more than \$500?

A. That is right.

Q. Going down to another item here, this Adams grader, do you happen to remember it particularly?

A. I don't recall it too well at the present time, Mr. Turner.

Q. Do you remember the Northwest 25 shovel?

A. Yes.

Q. What condition was it in?

(Testimony of Spencer M. Forkner.)

A. It was in operating condition.

Q. And based on its operating condition did you reach a reasonable market value?

A. I thought it was the reasonable market value.

Q. Do you remember the gas tanker, 3,900 gallons, that you have appraised at \$800?

Mr. Crain: If you please, would you try to count these and refer to these by number so that we can all find them?

The Court: You are referring now to a 3,900-gallon gas tanker?

Mr. Turner: Yes, it must be on the same page—the middle of page 2. You have a value of \$800 for that item particularly.

A. Offhand I can't recall; it's been quite some time ago.

Q. Do you remember the International wrecker 361B? It's [122] the last item, probably, toward the bottom of page 1. You have it appraised at \$600.

A. Yes.

Q. Do you remember its condition?

A. As I recall I believe it was in operating condition, that particular one—I think it was.

Q. And in operating condition you felt \$600 a reasonable market value? A. That is right.

Q. Do you remember a lathe?

A. I don't—vaguely, just vaguely.

Q. Now when you testified to market value do you mean the market value in Guam as of the time of your appraisal?

(Testimony of Spencer M. Forkner.)

A. I meant the market value in Guam, yes, that is right.

Q. There would have been little difference between the amounts as you appraised them and if they had been appraised as of October 1, 1952?

A. Would you state that question again?

Q. Well, when did you make your appraisal? I will withdraw the question.

A. Actually I couldn't tell you exactly when we made the appraisal. Somebody must have that record.

Q. Do you remember what year it was in?

The Court: Well, he has testified it was '53.

Q. (By Mr. Turner): I think you testified earlier there [123] would have been little difference in that market value and October 1, 1952?

A. That is right.

Q. Mr. Forkner, I will show you a piece of paper and ask you if you recognize it?

A. Yes, sir.

Q. What is that document?

A. It's a document stating that Mr. Norris would be the third appraiser.

Q. And that is signed by you?

A. That is signed by me, yes.

Mr. Turner: I am offering it in evidence. I want to know if you have any objection?

Mr. Crain: No objection.

The Court: Without objection it will be received.

Q. (By Mr. Turner): Mr. Forkner, referring to Plaintiff's Exhibit 8, you and Mr. Lathrop, as stated therein appointed Mr. Norris as a third

(Testimony of Spencer M. Forkner.)

appraiser? A. That is right.

Mr. Turner: That is all the questions I have.

Mr. Crain: May I have that, please, Cris?

Cross-Examination

By Mr. Crain:

Q. Do you recall where you signed this statement, Plaintiff's Exhibit 8, Mr. Forkner? [124]

A. Do I recall——

Q. Where you signed it?

A. No, I don't recall.

Q. Do you recall who presented it to you?

A. Mr. Lathrop.

Q. Did you write Mr. Norris' name in the body of that document? A. No, I did not.

Q. At that time did you know Mr. Norris?

A. Vaguely.

Q. Did you know him as an equipment man, a person experienced in buying and selling and appraisal of equipment?

A. All I knew he was taking Mr. Lathrop's place in Koster and Whyte as their equipment man. I met him twice.

Q. Did Mr. Lathrop give you any reason why he wanted you to sign it?

A. Mr. Lathrop was leaving himself; I know that. He was going to the Philippines and he said he thought Mr. Norris was a competent man.

Q. And it was on Mr. Lathrop's representation that Mr. Norris was a competent man that you agreed to sign this document for him?

(Testimony of Spencer M. Forkner.)

A. That is right.

Q. On the appraisal itself Mr. Turner has questioned you particularly concerning item No. 4 on page 1, a TD18 [125] bulldozer? A. Yes.

Q. And you testified that that piece of equipment had the differential dismantled and gone, is that right? A. That is right.

Q. In appraising that piece of equipment were you considering its actual market value in Guam at that time or its value to you on the basis of perhaps you owned other TD18's?

A. Well, that is what I would have paid for it because I owned other TD18's and I had the parts to fix it up.

Q. You could have fixed it up or you could have used parts out of the other TD18's to fix it up, is that right? A. Yes.

Q. Would that particular piece of equipment be worth \$3,000 at that time?

A. It depends on what use a person might have for it and if they had the parts available.

Q. You were peculiarly in that position, is that right? A. I had parts.

Mr. Turner: I object. Mr. Crain says you were "peculiarly" in that position. It doesn't mean he was the only one.

Q. (By Mr. Crain): Do you know anyone else on the island who was in the market for the hulk of a TD18 at that time?

A. Well, I wouldn't know.

Q. Now on page 1 again of the list of equipment,

(Testimony of Spencer M. Forkner.)

beginning [126] with item 5, taking items 5, 6, 7, 8, 9, 10, 11, 12 and 13, those are all trucks—the valuation that you placed on those trucks was for what? For those to be used as trucks?

A. Most of these were not in operable condition; they were for parts.

Q. This evaluation that you placed upon those trucks then was the value of the parts that could have been removed from them?

A. That is right.

Q. Was this value that you placed on these particular items the value of those parts after the trucks had been dismantled or as they sat?

A. Well, I considered it after they were dismantled.

Q. After they were dismantled? In other words as they sat they would have been worth a lesser amount than the figures that you have appraised them here?

A. I believe at the time I mentioned that was what we would pay for the parts after they were dismantled.

Q. After they were dismantled?

A. Right.

Q. What would you estimate, Mr. Forkner, that it would cost in proportion in connection with the appraised figures you have given for these trucks—what proportion would it cost to pay for labor and dismantling?

A. It cost us \$30 apiece; that is what we do it

(Testimony of Spencer M. Forkner.)

for; [127] maybe some people do it cheaper; I don't know.

Q. Now would the same situation pertain to the five gas tankers that are toward the bottom of page 1? There are five gas tankers of 2,000 gallons each, with a total evaluation of \$610. Were they also only appraised for parts?

A. I recall that some of them were and some of them weren't. I can't exactly recall which was and which weren't. I believe there was one good one in there.

Q. One good one and four bad ones and you would say the same thing would apply—a \$30 reduction in the value of each of the others for dismantling? A. Or whatever it might cost.

The Court: Before you leave page 1 on the sheet I have there are three lowboys shown.

Mr. Crain: Oh, our page is different. I am sorry, your Honor. These are made out on a longer sheet and have more items on them.

The Court: Mine shows one lowboy, \$100; one lowboy, \$300; and one lowboy, Frank D. Perez & Brothers. They are not extended to any evaluation. Do your copies show an evaluation?

Mr. Crain: It is my recollection that the one at Frank D. Perez' he claims is his own, is that right, Mr. Turner?

A. These five gas tankers—I am sorry; I was looking at the trucks.

Mr. Turner: The lowboy at Frank D. Perez' belongs to the corporation. [128]

(Testimony of Spencer M. Forkner.)

The Court: My point is these values of the three lowboys are not extended on my sheet.

Mr. Crain: They are not extended, no.

The Court: If you are going to compile this, you have to have a figure on those three lowboys.

Q. (By Mr. Crain): Do you recall the lowboy trailer that is listed here as being at Frank D. Perez Brothers, or did you ever see that one?

A. I never saw it.

Q. On the bottom of page 1 of this——

The Court: Now Mr. Forkner has explained that he may have misunderstood your question as to the gas tankers.

Q. (By Mr. Crain): Let's go back to the five tankers. Were those, in your estimation, only to be cut up for parts?

A. I was thinking of the scrap iron and the value of the tires.

Q. Scrap iron and tires?

A. That is right.

Q. You feel that your evaluation then for those purposes is correct? A. I think so.

Q. OK what about the two items further down, the dump truck without an engine?

A. That was for parts.

Q. That would be subject to a \$30 reduction, is that [129] correct? Prior to the time of the appraisal of this equipment, Mr. Forkner, were you acquainted with Mr. Lathrop?

A. Yes, I was.

(Testimony of Spencer M. Forkner.)

Q. Was he engaged in the buying and selling of heavy equipment in Guam to your knowledge?

A. I believe he was on the side, yes. He was working for Koster and Whyte and buying equipment and shipping it to Manila.

Q. To the best of your recollection did you make your appraisal fairly close in point of time to when Mr. Lathrop made his?

A. I don't know when he made his.

Mr. Crain: I have no further questions.

Redirect Examination

By Mr. Turner:

Q. Mr. Forkner, you testified in connection with items that you have on there which you were going to use for spare parts and it would cost you \$30 to develop the spare parts, but these are the figures you felt each piece of equipment would reach without being torn down?

A. That is the price I thought they were worth; whether they could tear them down for \$30 I don't know.

Q. Would you buy them for the figures you have there? A. I would if they were torn down.

Mr. Turner: That is all I have. [130]

Mr. Crain: I have nothing further.

The Court: Thank you for coming.

Mr. Turner: Your honor, at this time, pursuant to discussion about the deposition this morning, I

would like to offer in evidence the deposition of Mr. Lathrop and a copy of the appraisal to attach to it.

The Court: I have one deposition here.

Mr. Turner: That is Mr. Schwendinger's. I feel that this should be made available to Mr. Crain overnight for study because he hasn't gotten a copy.

Mr. Crain: I don't think I need it overnight.

Mr. Turner: This is the copy I have.

Mr. Crain: That I never did see.

Mr. Turner: Well, the original was sent to Manila and I made this. You remember I sent all my copies to Manila. So may this be attached as a copy?

Mr. Crain: The originals are to be substituted for those pursuant to the rules of the court.

The Court: Now are you introducing your deposition with the understanding that it represents an exact copy of the original and the original shall be substituted when it arrives?

Mr. Turner: This copy is certified to by the vice counsel as a true and correct copy except for the one exhibit which we are submitting here.

The Court: Is that exhibit attached to the original? [131]

Mr. Turner: Yes.

The Court: You want to stipulate to its admission, subject to check with the original when it arrives?

Mr. Turner: For substitution by the original.

Mr. Crain: What about objections that may have been made by counsel?

Mr. Turner: Well, I have gone through it. I

found no objections. I would say it could be admitted subject to your objections after study. There were no objections by counsel and I have read the thing entirely through.

Mr. Crain: Well, on that basis.

Mr. Turner: Yes, sure, any objections reserved subject to determination by the court.

The Court: If I understand correctly, counsel stipulate that this deposition is a true and correct copy of the original?

Mr. Turner: The deposition of Walter Lathrop.

The Court: And that no objections are raised as to any irregularity of the taking, but the duplicate shall be withdrawn if and when the original arrives and the original substituted for it; that there is attached to this deposition a schedule or an exhibit and that that is accepted as being a true and correct copy of the original exhibit, which is attached to it?

Mr. Crain: The original deposition. [132]

The Court: To the original deposition and it may also be substituted for the original. Very well, is it further stipulated that that deposition shall appear in the record as part of the transcript and that the court may read it and it need not be read aloud?

Mr. Turner: Right, so stipulated and also, your honor, that is, after perusal, if there are any objections by opposing counsel, they may be raised by Mr. Crain and passed upon by the court.

Mr. Crain: Right.

Mr. Turner: Your honor, would the court care for a short recess?

The Court: Well, it's going to take me a few minutes to read this. If counsel want to amuse themselves in some other fashion, they may do so. These items that Mr. Lathrop appraised are not in all respects as Mr. Forkner's.

Mr. Turner: They are not in the same order, Judge.

The Court: He is referring here to some pumps. I don't recall any pumps on Mr. Forkner's.

Mr. Turner: What is the designation of the item on Mr. Lathrop's?

The Court: Well, it is item 9 on page 3, which reads "3 grease pumps (New) heavy duty." The word "new" is inserted in parentheses, and I ask you why you use that description?

Mr. Crain: On Mr. Forkner's they are on page 3 and I [133] think they are listed as "lube pumps." They are listed in the items in warehouse 1.

Mr. Turner: Just a little different nomenclature.

The Court: His evaluation here is \$50 each. Mr. Lathrop's evaluation is \$50 each. This reads: "Q. I show you item 15 on page 3, Annex A, which reads: 3# Grease Pumps (New) Heavy Duty; where the word "new" is inserted in parentheses, and I ask you to explain why you used that description? A. These pumps were brand new. They had been purchased in the United States but were never installed. They were in crates. Q. How did you fix the value of \$150 opposite that item? A. That is the approximate value of that piece of machinery."

Would these be the same pumps as Mr. Forkner put down at \$15 each?

Mr. Turner: I guess so.

Mr. Crain: I am sure they must be because they were in the warehouse.

The Court: Do I understand that Mr. Crain wanted to read this deposition overnight?

Mr. Turner: Would you like to read it overnight? I imagine you would.

Mr. Crain: It would be preferred, your honor, because the copy now and the original cannot possibly get in here before Wednesday morning, so if it could be made available to me tonight along with the exhibit, I would appreciate it.

The Court: You don't have Mr. Forkner's [134] total?

Mr. Turner: Well, Mr. Crain and I will agree upon the mathematical total and stipulate to the court.

The Court: Would you further stipulate that Mr. Lathrop's appraisal is of the same items as Mr. Forkner's?

Mr. Crain: In checking the four appraisals that we have there are certain items missing from each one that each appraiser missed, and they didn't miss the same items.

Mr. Turner: But I would say, wouldn't you, that they substantially appraised the same items?

Mr. Crain: Substantially, yes.

The Court: Substantially is somewhat lacking in accuracy.

Mr. Crain: Mr. Viray made a comparative anal-

ysis of the four appraisals which I think we probably will want to furnish to the court.

The Court: Well, Mr. Turner agrees that Mr. Crain may take these overnight.

Mr. Turner: We have a comparative analysis that I think tomorrow we can stipulate after they are all in to give you, your honor.

The Court: Very well.

Mr. Turner: We will call James Norris as our next witness.

JAMES NORRIS

called as a witness by the plaintiff, was duly sworn and testified as follows: [135]

Direct Examination

By Mr. Turner:

Q. Kindly state your name and address.

A. James Norris, Koster and Whyte Construction Company.

Q. Are you employed by Koster and Whyte?

A. That is right.

Q. How long have you been so employed?

A. Four years.

Q. And what is your present position with Koster and White?

A. Mechanical superintendent.

Q. Have you had that position for the last four years? A. I have.

Q. How much of that has been in Guam?

A. All four years.

(Testimony of James Norris.)

Q. During the course of your time as mechanical superintendent of Koster and Whyte have you had occasion to buy and sell heavy and light equipment?

A. For the last two and a half years that's what I have been doing most of the time.

Q. Where did you purchase this heavy equipment?

A. From all places, sir, plus bid, wherever we can pick it up.

Q. Have you purchased any in Guam?

A. Yes, we have. [136]

Q. You say you have been so engaged for approximately two and a half years?

A. Approximately two and a half.

Q. Prior to the past two and a half years have you had any experience in purchase of heavy and light equipment? A. I have.

Q. Prior to the past two and a half years have you had any experience in the purchase of heavy and light equipment? A. Yes, I have.

Q. Where? A. In Kansas City, Missouri.

Q. For how long were you so engaged in Kansas City? A. About four years.

Q. Did you come to Guam in the employ of Koster and Whyte? A. No, I did not.

Q. For whom did you come?

A. For Morris and Knudsen.

Q. What did you do with them?

A. I was repairman in charge of the shops.

Q. Did you buy heavy equipment?

(Testimony of James Norris.)

A. I bought parts but at the time there was very little bought here in Guam; it was off-island.

Q. You testified in Kansas City you purchased heavy and light equipment. Was that for your own account?

A. For Sullivan Motor Company. [137]

Q. New, used or both?

A. Both new and for resale.

Q. In the last two and a half years have you bought used equipment or new or both?

A. Both.

Q. How many items would you state you purchased in the last two and a half years for Koster and Whyte?

Mr. Crain: If the court please, I would object to that because it covers a period of time considerably subsequent to 1 October, 1952.

The Court: Possibly you can stipulate to his qualifications?

Q. (By Mr. Turner). Prior to, say, the middle of 1953 how much experience had you had in Guam in purchasing heavy and light equipment, new and used?

A. In Guam?

Q. Yes. A. About two years.

Q. And during that two years can you state to the court how many items you purchased or sold?

A. Well, that would be hard to state. It was buying and selling, trading.

Q. Did you have occasion in 1953 to appraise any equipment that Island Service Company, Inc., had?

(Testimony of James Norris.)

A. I appraised the equipment of Island Equipment Company in [138] late '53.

Q. Where were the items that you appraised?

A. They were scattered from Frank Perez Brothers to Mr. Hines in Tamuning down to the sand yard at Tumon Beach.

Q. In appraising, what value did you fix on it, the market value or what?

A. Well, on most of the equipment, construction road equipment—I appraised that at the value that we would give. I say “we”—Koster and Whyte—the value it would have been worth to us.

Q. The value was what you would have purchased it for?

A. That is right.

Q. Now the items that Koster and Whyte were not willing to purchase, what value did you fix on them? What did you fix on the other items?

A. The other items what they were selling for around Guam.

Q. Those items it was the general market value?

A. On the surplus market.

Q. I show you a three-page document and ask you if you recognize it, a typewritten document?

A. This is the document that I made up in late '53 and I sent these copies out to, I think, four different persons.

Q. This represents your appraisal of the Island Service Company equipment that you testified to previously?

A. That is right. [139]

Mr. Turner: Your Honor, I would like to have this admitted in evidence without objection.

(Testimony of James Norris.)

The Court: Very well.

Mr. Turner: Plaintiff's Exhibit next in order. Would you kindly staple that last page to the front, please.

Q. (By Mr. Turner): Mr. Norris, while the clerk is marking the exhibit would you state how you customarily appraise a piece of heavy or light equipment or machinery? What inspection did you give it?

A. Well, it's all according to what it is. First, we always appraise by whether it is in running condition and what shape it is in, what condition it is in, then according to how badly it is worn and how rusty.

Q. Do I understand you first approach any piece of equipment to determine if it is in running condition?

A. That is right.

Q. And if it is not in running condition, it is what parts are missing and general overall condition?

A. That is right.

Q. How long did it take you to appraise this equipment?

A. I was about two days, a day and a half—one full Sunday and a part of another one.

Q. I hand you your appraisal sheets which have now been marked Plaintiff's Exhibit 9 and ask you what items on there you appraised as the amount that Koster and Whyte at that time [140] were prepared to pay for them?

A. The Northwest shovel 25.

(Testimony of James Norris.)

Q. How much did you appraise that for?

A. \$4,500.

Q. Next item?

A. The Adams road grader.

Q. How much did you appraise that?

A. \$3,200, and the road roller at \$3,500 and the TD18 bulldozer at \$4,200 and the International diesel truck, 600-gallon truck, at \$875, and the 3,900-gallon tanker at \$2,000.

Q. Do I understand Koster and Whyte were prepared to purchase that?

A. At that time they were and most of the miscellaneous shop equipment, the testing machines, valve reseating machines and quite a bit of the small tools.

Q. Mr. Norris, did you at any time offer to Mr. Hines or a representative of Island Service Company to purchase that equipment?

A. On the Sunday that we were estimating, appraising the equipment, one of Mr. Hines' representatives was with me at the time and I told him. Also they had a sandblasting machine in the back there. I told him that we could use the stuff and pay what I appraised it for, but I don't think I told it directly to Mr. Hines.

Q. What did the representative of Mr. Hines say? [141]

A. He said it could not be sold.

The Court: Who was that representative—Mr. Viray?

(Testimony of James Norris.)

A. Yes, sir, it was the Filipino accountant who formerly worked with Koster and Whyte.

Mr. Turner: Your witness.

Cross-Examination

By Mr. Crain:

Q. You mentioned the fact that some of this equipment was at Island Equipment Company? You meant to say Island Service Company?

A. Island Service Company.

Q. You mentioned Sullivan Motors in Kansas City. That is an automobile dealership?

A. No, it is not.

Q. What is their business?

A. Caterpillar tractors and all earth-moving equipment.

Q. When did you work for Sullivan Motors?

A. 1946 and '47, early part of '47.

Q. When did you come to Guam for Morris and Knudsen? A. November '47.

Q. How long were you with Morris Knudsen?

A. November '47 to April '49.

Q. And then where did you go?

A. I was purchasing for the Army Post Engineers, Marbo.

Q. What did you purchase? [142]

A. Equipment foreman and also done quite a bit of buying for them.

Q. What were you buying particularly?

A. Well, I was in charge. Then we had local

(Testimony of James Norris.)

purchase of most of all our spare parts for our equipment what we couldn't get on the base.

Q. Were you buying new or used equipment?

A. New and used both.

Q. This offer to purchase these certain items of equipment on the part of Koster and Whyte was never made by Koster and Whyte directly to Mr. Hines?

A. Well, I am authorized from Koster and Whyte to purchase anything I need.

Q. Well, no such offer was ever made by Koster and Whyte to Island Service Company?

A. After I took the appraisal of it and the boy told me it was not for sale it was never carried any further.

Q. You never asked Mr. Hines to confirm that statement in any way?

A. No, sir.

Q. Isn't it correct that when you made this appraisal of these particular items of equipment that you took approximately three to four weeks to compile your figures and submit your appraisal after you had actually looked at the equipment?

A. No, it wasn't that long. [143]

Q. How long was it?

A. Because I took—we started on one Sunday and we didn't get to see all of the equipment. There were two or three items I had to look at the following Sunday and then it was that week I got it typed up and submitted.

Q. Isn't it correct that you used an equipment

(Testimony of James Norris.)

manual from the States for part of the information that you felt you needed in order to reach figures that you have set down in your appraisal?

A. No, sir.

Q. You never did? A. No, sir.

Q. You testified on direct examination that prior to 1953 you had bought and sold a substantial amount of equipment on the island?

A. That is right.

Q. Can you give us a little more accurate idea of how much substantially that was?

A. I would say in the neighborhood of \$100,000.

Q. Was any of that for your own account or for employers?

A. That was for employers and some of it for my own account.

Q. What percentage?

A. I bought probably \$10,000 or \$12,000 for my own account and the rest for employers. [144]

Q. Was it mostly for Koster and Whyte?

A. Koster and Whyte and Vinnell.

Q. Did you work for Vinnell? A. I did.

Q. When?

A. 1950, '51 and part of '52, the fall of '50, '51 and up until January '52.

Q. Well, now, actually in purchasing for Koster and Whyte and Vinnell you were going out and buying specific items they needed on the market? You were not buying and appraising equipment in the open market?

A. Well, we bought and sold. Vinnell bought

(Testimony of James Norris.)

quite a bit of equipment here on the island. We were fixing it up and shipping it.

Q. Mr. Norris, were you given any instructions as to how you should perform this appraisal other than that you were told the location of the equipment, given a list of it and told to go appraise it?

A. I think Mr. Hines was there or one of his representatives was with me showing me the equipment.

Q. You never discussed with Mr. Lathrop his evaluation of the individual items of equipment?

A. I did not.

Q. Did you with Mr. Forkner?

A. No, sir. [145]

Q. Did you ever see, before you made your appraisal, the appraisals that had been made by Mr. Forkner or Mr. Lathrop?

A. I never saw them to date.

Q. In other words, in making your appraisal you did not try to adjust differences between those two appraisals? A. No, sir.

Mr. Crain: That is all.

Mr. Turner: Do you have any questions, your Honor?

The Court: No, thank you very much.

Mr. Turner: That is all I have except Mr. Wiseman.

The Court: Very well, we will recess until tomorrow morning.

(The court recessed at 4:30 p.m., October 24, 1955, and reconvened at 9:30 a.m., October 25, 1955.)

The Court: Just take the stand, Mr. Wiseman.

SHERWOOD WISEMAN

Direct Examination

The Court: You are through with Mr. Wiseman?

Mr. Turner: No, Mr. Crain had started to examine him on voir dire in connection with the balance sheet. It is my understanding you are willing to let the exhibit go in without objection? May I have the plaintiff's last exhibit? May the record show that Mr. Crain has returned the deposition of Mr. Lathrop to the court's files.

Mr. Crain: And the exhibit.

Q. (By Mr. Crain): Mr. Wiseman, referring to Plaintiff's [146] Exhibit 6 there is a difference on the reconciled cash on hand and in the bank—your Honor, I have had the reporter prepare an extra copy which may be of assistance to you—there is a difference between Mr. Viray's cash on hand and in bank and Mr. Kaneshiro's. Do you know what that difference consisted of?

A. No, I don't.

Q. All of the other items are in agreement down to buildings at value per agreement less reserve. You have \$21,616.59 for Viray and \$21,769.10 for Kaneshiro—a slight difference but do you know what that difference consists of?

A. Yes, I think that is involved in the reserve.

Q. It depends on the depreciation?

A. Yes.

(Testimony of Sherwood Wiseman.)

Q. In other words, Mr. Viray and Mr. Kaneshiro were unable to agree with you on a value for the fixed depreciation of the buildings?

A. Well, I wouldn't say that; I never tried to get them into agreement.

Q. But they were in agreement this figure for Viray on the buildings represents his agreed figure and the one for Kaneshiro represents his agreed figure?

A. Yes, I seem to recall that.

Q. And the same for cash on hand and in the bank. Now going down to heavy equipment, note 1. What is Note 1? Let me ask you this: Did you select that figure because it was [147] the third appraisal pursuant to the agreement?

A. No, my note No. 1, which is a very important part of the figures I come up with—in fact all of the notes I have bear a relationship to the qualifications, let us say, that I as an accountant made relative to the figures that are on this statement, and my note No. 1 says I have adjusted Mr. Viray's balance sheet equipment value to reflect the value shown by Mr. Kaneshiro's on the understanding that the amount of \$34,391 is the amount agreed upon as the appraised value of the equipment.

Q. I see. If there was any change in that heavy equipment upwards it would increase the surplus upward; it would increase the surplus by the amount of the change?

A. Any change in this figure would have to be adjusted on the two balance sheets.

(Testimony of Sherwood Wiseman.)

Q. But it would increase the surplus?

A. Yes.

Q. Now down on notes payable you have "See Note II." There is a difference there of \$13,659.15 on Mr. Viray's adjusted balance sheet and \$16,959.15 on Mr. Kaneshiro's balance sheet.

A. Well, Note II reads "A difference of \$3,300 is shown between Mr. Viray and Mr. Kaneshiro. I have not examined the note due Mr. Perez, although it would appear that Mr. Viray's figure is correct. In Mr. Turner's undated memorandum to Mr. [148] E. R. Crain relative to Island Service Company audit Mr. Turner notes and it is in quotes 'with reference to notes payable the amount payable to Mr. Perez should be \$13,659.15. It is requested that Mr. Viray recheck his figures on payments to Mr. Perez on his notes,' end of quote. Although it is noted that Mr. Viray shows an agreed amount of \$13,659.15 while Mr. Kaneshiro's audit shows the larger amount, a review of the notes in question would reveal the correct amount," and I think in my subsequent remarks in my original report under Note II, I made mention of a difference of \$3,300 between the notes payable of Mr. Kaneshiro and Mr. Viray. A recap of the two figures shows that Stanley Kaneshiro had \$16,959.15 and Viray a difference of \$3,300. A portion of this difference, \$3,000, is due to the treatment given a check in the amount of \$5,000 which was payable to Mr. Perez from the Treasury of the United States. This check represented a refund to Mr.

(Testimony of Sherwood Wiseman.)

Perez of the deposit he maintained with the federal government. Mr. Perez contended he gave this check to the Island Service Company, Inc., in payment of \$2,000 he owed the company and that he did not receive the remaining \$3,000. On this reasoning Mr. Kaneshiro set up an increase in notes payable to Mr. Perez. Accountant for Mr. Hines, Mr. Viray, says proper records are lacking to substantiate or refute the claim by Mr. Perez and it should not be set up until complete substantiation is forthcoming. I requested and received a photostatic copy [149] of the check. It was indorsed in blank by Mr. Perez, that is, Joaquin A. Perez. Directly beneath this indorsement appeared an additional indorsement, Island Service Company. In addition the document showed that it had been paid by the local branch of the Bank of America on March 11, 1951. I then requested the Bank of America to check the deposits made around that date by Island Service Company, Inc. The record showed that the check had been deposited to the credit of the account of Island Service Company on March 15, 1951, together with other checks. From the above it appears that Mr. Perez did give the check to Island Service Company and a receipt covering this money cannot be found nor can it be traced to any of the books of Island Service Company. It would be difficult to prove giving him full cash in the amount of \$5,000 or that the Island Service Company did not receive the check from Mr. Perez, deduct the \$2,000 owed

(Testimony of Sherwood Wiseman.)

by Mr. Perez and return \$3,000 in cash to him. In line with the above and due to the lack of further substantiation, it would appear that Mr. Kaneshiro did not possess the required substantiation. The remaining difference of \$300 cannot be traced by me. In other words, I did not make any adjustments on the books for that figure, but my comments are a very very important part of what figures I have on this comparative balance sheet.

Q. I see. This comparative balance sheet then, with those notes, constitutes your reconciliation of the two audits [150] and do I understand that this comparative balance sheet sets forth, except for those differences, adjustments in each of the auditor's balance sheets that they accepted?

A. Yes.

Q. Mr. Wiseman, in your reconciliation did you use standard accounting methods?

A. Yes, I did.

Q. Do you possess a copy of the Standard Accountant's Handbook? A. Yes, I do.

Q. Would you say that your reconciliation was in accordance with the standards set up in that accounting handbook?

A. To a point it was, yes.

Q. When does an accountant refer to the Standard Accountant's Handbook?

A. Well, basically an accountant refers to that on items that he may be a little rusty on and for proper forms that he may want to use.

Q. I see. Did you feel it was necessary in this

(Testimony of Sherwood Wiseman.)

type of reconciliation to refer to the Accountant's Handbook at any time? A. No.

Q. So you do feel that there were standard accounting methods used in this reconciliation?

A. There again up to a point. [151]

Q. What do you mean?

A. Let's say if I were auditing the books of Island Service Company I would have gone into it much more fully.

Q. But in your reconciliation you applied standard accounting principles? A. Yes, I did.

Mr. Turner: That is all.

Cross-Examination

By Mr. Crain:

Q. Is it substantially correct, Mr. Wiseman, that the comparative balance sheet that you prepared here was not intended to be an actual final statement of the condition of Island Service Company as of the 30th of September, 1952, but rather that this comparative balance sheet has to be taken in consideration with all of your notes and comments that are attached to it and that pertain to it?

A. Yes, that is right.

Q. In other words, this balance sheet is for all practical purposes an educated guess as to what these accountants were trying to arrive at in this supposedly joint audit that they conducted?

A. Can I ask you a question? An educated guess by whom?

Q. By you.

(Testimony of Sherwood Wiseman.)

A. Not, it's not that. All I did was to take respective balance sheets given to me by the two gentlemen and try to tie [152] in the two sets of sets of figures by having discussions with them and applying standard accounting principles where they didn't.

Q. Where they did not? A. Yes.

Q. Or where you couldn't determine that they had by cursory examination? A. Yes.

Q. Is it correct that you used Mr. Kaneshiro's balance sheet as a basis for your examination of both of these because of the fact that he had been the bookkeeper for Island Service Company and that you went on the assumption that he should have had the most thorough knowledge of the condition of the company's books?

A. Yes, I think you could say that.

Q. In other words, you used Kaneshiro's balance sheet as the fulcrum for making your adjustments back and forth in both it and Viray's?

A. Well, let me say it this way—let me say I adjusted Mr. Viray's balance sheet much more than I did Mr. Kaneshiro's balance sheet.

Q. Did you ever see the working papers or other substantiating data that Kaneshiro used in arriving at the figures contained in his balance sheet?

A. No. [153]

Q. Am I correct that the figure of \$34,391 used by you in your comparative balance sheet as the value of the heavy equipment at its appraised value was arbitrarily taken by you from Mr. Kaneshiro's

(Testimony of Sherwood Wiseman.)

balance sheet? A. Yes, that is right.

Q. But in your note you indicated that the final acceptable appraised value would vary the final figures of the balance sheet as to whether it went up or down? A. Yes.

Q. Now on your comparative balance sheet you have one other item here—the reserve for income taxes in the amount of \$10,903.79. Was that set up by you as the result of an assessment of deficiency by the Government of Guam against Island Service Company for income taxes for 1951 and 1952? A. Yes.

Q. And that item is actually a liability of the corporation and not to be considered a part of its surplus?

A. Well, it's a liability until the deficiency is abated by the Government of Guam.

Q. But in determining the value of the corporation that item should be deducted from the surplus rather than added to it, should it not, in determining the net value of the corporation?

The Court: It has been deducted, hasn't it?

Mr. Crain: It is included in there and it does not appear [154] in Mr. Kaneshiro's balance sheet.

A. I show it as a reserve.

Q. (By Mr. Crain): Going back to the accounts receivable, Mr. Wiseman, you testified yesterday that you had finally set up a reserve in the amount of \$16,473.24 as against a total of accounts receivable in excess of \$70,000, is that correct?

A. Yes.

(Testimony of Sherwood Wiseman.)

Q. Did you ever examine the entire list of accounts receivable of Island Service Company?

A. Well, I was shown the detail list, but I never checked them back to the books.

Q. By whom were you shown the detail list?

A. Mr. Viray.

Q. You never examined those accounts receivable for quality, did you? A. No.

Q. You never discussed those accounts with anyone other than the two accountants?

A. That is right.

Q. Not with the management of Island Service Company to determine the amount of work that had been done in an attempt to collect the outstanding accounts? A. No.

Q. Taking you as an accountant, Mr. Wiseman, who has been qualified as an expert here and taking the hypothetical [155] situation that an examination of these accounts and a discussion of them with the management of the company would have substantially satisfied you that major attempts had been made to collect these accounts, that each debtor had been contacted and demand had been made, and that it had been determined that some of these debtors no longer were in Guam, the others had no assets, that still others claimed that they had made payment to an officer of the company—in a situation like that would you feel that the reserve for bad accounts receivable could conceivably be raised to a higher figure than the one that you set up?

(Testimony of Sherwood Wiseman.)

Mr. Turner: I object to this, your Honor, on the grounds that there has been no evidence introduced in this court to which this hypothetical question could have any relevancy.

The Court: Objection sustained. A hypothetical question must be based on facts in evidence or testimony in evidence. Mr. Viray's testimony was not that demands were made but that letters were sent out asking people if they acknowledged the debt.

Mr. Crain: On cross-examination Mr. Viray testified that every one of these people had been contacted personally.

The Court: He said "no." The question you asked him was whether the letters had been hand-delivered.

Mr. Crain: Mr. Viray read into the record the fact from his own notes and comments that each debtor had been personally [156] contacted.

Mr. Turner: Your Honor, that is directly contrary to the schedule. He listed specifically each debtor he had the letter sent out to but no answer.

The Court: The question was asked Mr. Viray as to whether these letters had been delivered by hand and he responded that they had. He testified, as your question states, that in some instances the debtors had left the island and there was some confusion as to the payment to an officer of the company. He testified at one time that he could only remember one person then inferred that there were others, but his own compilation shows that the letters he sent out were not demand letters but just

(Testimony of Sherwood Wiseman.)

to acknowledge the indebtedness as shown on the books and that was his testimony.

Q. (By Mr. Crain): When we were previously discussing the Standard Accountant's Handbook, Mr. Wiseman, am I correct in my understanding that standard accounting procedures and general instructions in that handbook called for conservatism in the handling of the matter of old accounts receivable and that the handbook would give the accountant considerable leeway in applying a conservative program to setting up what he would consider to be an adequate reserve for those bad debts?

A. Yes, that is right.

Q. And taking that into consideration and taking into consideration the fact that Mr. Viray is the accountant for [157] Island Service Company as well as auditor of the audit that is now in question, would it not be just as reasonable that his reserve of \$36,000 would be as conservative as your reserve of \$16,000 which was not tied into any knowledge of the quality of these accounts?

Mr. Turner: That is contrary to Mr. Viray's testimony. He testified that he wrote off \$36,000. It is a great deal different than setting up a reserve of \$36,000.

Mr. Crain: I will qualify my question.

Q. (By Mr. Crain): His writing off of \$36,000 accounts receivable as bad debts would be just as reasonable, within the limits of conservatism advocated by the Accountant's handbook, as the setting up of a reserve of \$16,000?

(Testimony of Sherwood Wiseman.)

A. Well, theoretically he shouldn't write them off. He should provide a reserve and then after considerable work had been done on the accounts and after it is finally determined that the account is uncollectible then he could write off his account against the reserve.

Q. Well, you said theoretically he shouldn't have done it one way; he should have done it the other. Wouldn't the practical application be much the same whether he would write them off or set them up as a reserve?

A. No, it is not exactly the same. Once you write off an account then it is pretty well forgotten but when you set up a reserve against it you still have the account open as being due. [158]

Q. Merely because you write it off doesn't mean you cease attempts to collect it, does it?

A. No, but it is a pretty good indication that you have pretty well forgotten it.

The Court: If you write it off it never again shows up in your accounts as an asset.

Mr. Crain: It would if you would pick it up—if you collect it.

A. No, it would be income.

Q. (By Mr. Crain): For the same practical purpose though—

A. From an accountant's angle I don't think he would be justified in writing off the accounts because when you write off an account or set up a reserve for an account you do it when the account

(Testimony of Sherwood Wiseman.)

has actually become bad not when you think they are bad. There could be quite a difference.

Q. In the final analysis who determines whether they are bad or whether they are thought to be bad?

A. Well, it's up to the company to prove that an account became bad at an exact time rather than at a subsequent or prior time.

Q. But the accountant who was handling the books would in all probability be the best person to determine that, would he not?

A. Well, that is a tough one to answer.

Q. Let's take Jones and Guerrero. Who in the final [159] analysis there determines when an account becomes bad?

A. Well, either myself or Mr. Jones.

Q. You are the chief accountant, aren't you?

A. Yes.

Q. Actually, Mr. Wiseman, as among accountants each man has his own method of conducting his business? Two accountants with two identical sets of books do not often approach their problems in the same fashion, do they?

A. That is right.

Q. So that even though personally and from your training you disagree with Mr. Viray in writing off \$36,000 as bad accounts, he was still proceeding reasonably within what would be his prerogative as accountant for this company, would he not?

A. Basically, yes.

Mr. Crain: I have no other questions.

(Testimony of Sherwood Wiseman.)

Redirect Examination

By Mr. Turner:

Q. Mr. Wiseman, where a corporation was formed in November of 1950——

Mr. Crain: Excuse me—'49.

Q. (By Mr. Turner): '49, all right, and it had accounts upon its books for tax purposes would it be able to write those accounts off as of September 30, 1952? A. I don't think so.

Q. In other words, even the statute of limitations hasn't [160] passed——

Mr. Crain: I object to that. That is calling for a legal conclusion on the part of the witness.

Mr. Turner: All right then I will just withdraw that question.

Q. (By Mr. Turner): Isn't it true that the tax regulations do not permit the writing off of an account under all circumstances even when the statute of limitations has passed?

A. Well, upon the passing of the statute of limitations I think a man would be more able to prove the write-off of the account to the commissioner than any other way. I think that would be a very good way or basis to show the commissioner that you have written off an account because of such and such.

Q. Mr. Viray testified on cross-examination that he had written off \$36,000 of these accounts receiv-

(Testimony of Sherwood Wiseman.)

has actually become bad not when you think they are bad. There could be quite a difference.

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Q. Mr. Viray testified on cross-examination that he had written off \$36,000 of these accounts receiv-

(Testimony of Sherwood Wiseman.)

able as bad debts on instructions of Mr. Hines and that he considered it bad accounting practice. Would you agree with that statement of Mr. Viray?

A. Would you repeat that please?

A. Mr. Viray testified on cross-examination that he had written off some \$36,000——

Mr. Crain: If the court please, Mr. Viray testified on direct examination, not cross-examination.

Q. (By Mr. Turner): Well, make it direct—that he had written off some \$36,000 of accounts receivable on his second [161] balance sheet on instructions of Mr. Hines and that he, Mr. Viray, considered that to be bad accounting practice. Would you agree with that statement?

A. That Viray considered it to be bad?

Q. To write off that \$36,000 accounts receivable as bad debts.

A. Well, specifically why was he instructed to do it?

Q. He just said he was instructed. He did that on the second balance sheet but that he, Viray, considered that to be bad accounting practice. Would you agree that it was bad accounting practice?

A. Well, let me say it this way—if Mr. Hines wanted Mr. Viray to do something and Viray is working for Hines, I am reluctant to think that Viray would have any other alternative but to write them off.

Q. No, I am asking you if it would be bad ac-

(Testimony of Sherwood Wiseman.)

counting practice? A. To write them off?

Q. Yes.

A. I can't answer that question. I can answer it with all kinds of qualifications.

Q. Would you consider it to be unusual for a corporation to carry on its books from November of 1949 until 1955 the accounts receivable with a reserve set up for bad debts and then for one single balance sheet not use the reserve method [162] but write off bad debts?

A. You can't do it; if you are working with a reserve method of accounts receivable then you have to follow through that way.

Q. In other words, if the corporate practice was to use the reserve method then it would have to be in all balance sheets?

A. Yes and for tax purposes also.

Q. It would be inconceivable that a company would carry its accounts receivable on its books one way and then have them another way for tax purposes? A. It would be odd.

Q. Then another point I asked you before but I want to reask you—this balance sheet represents your reconciliation as best as possible of the differences between the two accountants except for items which are not the same, the two or three accompanied by your notes and the two accountants agreed to that reconciliation?

A. Um huh, but not to the best possible.

(Testimony of Sherwood Wiseman.)

Q. I mean not all the way through but on the adjustments they were made? They have already testified.

A. In other words, Mr. Turner, I did not look at any set of books that Hines or Island Service Company had. When I went into this contract that was one of the stipulations, that I wouldn't. [163]

Q. That you would attempt to reconcile the differences?

A. That I wouldn't get involved insofar as an audit.

Q. You were to reconcile the differences as far as possible?

A. As far as possible.

Q. And this Plaintiff's Exhibit 6 represents the reconciliation and the accountants agreed with that reconciliation?

A. Yes.

Mr. Turner: That is all.

Recross-Examination

By Mr. Crain:

Q. I will try to clarify this one item. This comparative balance sheet, Plaintiff's Exhibit 6, is not complete on its face unless your notes and comments are attached, is that correct?

A. That is right.

Mr. Turner: Do you have any questions, your honor?

(Testimony of Sherwood Wiseman.)

Examination by the Court

Q. As I understand it, Mr. Wiseman—I want to go over these item by item—in your conference with the two accountants they agreed on the current assets within \$150? A. Yes, sir.

Q. And they agreed on the fixed assets within 3 or \$400?

A. No, sir, there was still something to be done on the fixed assets and that was the appraisal. [164]

Mr. Crain: Not fixed assets. That is the heavy equipment.

Mr. Turner: Mr. Wiseman means that the heavy equipment is in the fixed assets.

Q. (By the Court): That is right and that was in dispute and could not be reconciled?

A. Yes, sir.

Q. But the value of the buildings was agreed to within roughly \$150? A. Yes, sir.

Q. And the office equipment was agreed to within roughly \$30? A. Yes, sir.

Q. And the furniture and fixtures agreed to within roughly \$150? A. Yes, sir.

Q. The heavy equipment is in dispute?

A. Yes, sir.

Q. The merchandise in transit—they were practically in agreement on that? A. Yes.

Q. And in entire agreement on the prepaid insurance, prepaid expense and the deposits?

A. Yes, sir.

(Testimony of Sherwood Wiseman.)

Q. The note payable under Note II does that discrepancy [165] largely represent the dispute over the Perez obligation? A. Yes, sir.

Q. In other words, Perez holds a note from the corporation?

A. It was set up in the notes payable account.

Q. He does have a note, does he?

A. The books do not show it one way or the other. Mr. Kaneshiro's balance sheet showed it as notes payable but I didn't see the note itself.

Q. And there is some question as to whether it was properly set up on the books as a note payable?

A. Yes, sir.

Mr. Turner: If I might ask a question. It is my understanding there isn't any argument on the books on account of the notes of \$16,000. There is an account on the books for that account? In other words, they are in agreement to the extent of the \$16,000? A. Yes, sir.

Q. (By the court): And the drafts payable were reconciled within roughly \$400?

A. Yes, sir.

Q. The accounts payable—they are in agreement? A. Yes, sir.

Q. And the accrued items—they are in agreement? A. Yes, sir.

Q. Now, let me ask you, Mr. Wiseman, as chief accountant [166] of a large firm do you have any opinion as to what credit losses should amount to, percentagewise, for the years '50, '51 and '52? In other words, if you extended \$10,000 worth of credit

(Testimony of Sherwood Wiseman.)

how much of a loss, percentagewise, would you expect?

A. Well, your honor, that is based on how rigid a collection program you have. If your collection program is at your fingertips and is under control all the time, your losses would be, I would say, less than five percent.

Q. Primarily it would be based on what credit risks you accepted?

A. Yes, sir. If you just arbitrarily give credit to every Tom, Dick and Harry that comes along you are going to have quite a bad debt loss.

Q. Well, would it be correct to say of a properly managed business that your credit losses should not exceed two or three per cent a year?

A. I would say that would be very close.

Q. And has that been your experience in Guam?

A. No, sir it hasn't.

Q. Your credit losses have been higher?

A. Much higher. Can I state a specific example?

Q. Yes.

A. I am connected with a very large company here other than Jones and Guerrero and their credit losses are terrific or they had been until the credit program was tightened up and [167] after they began to issue credit to only those houses of business on the island that warranted credit then the credit losses went way down to a very small amount. Prior to that they were giving credit to most anybody who came along. Whether he had a business or

(Testimony of Sherwood Wiseman.)

didn't—it seemed to make no difference as long as he sold the merchandise.

Q. Now, Mr. Wiseman, during the period which we are dealing with here we had no central source to obtain credit information? A. No, sir.

Q. Do we have any yet?

A. Well, this way you do—if a man is bad on the island now, it's pretty common knowledge—no central clearing agency or anything like that.

Q. That of necessity meant that during this period in question the individual businessman had to exercise his own individual judgment?

A. Yes, sir.

Q. As to whom he would extend credit to, but you feel that your reserve here is reasonably adequate in the light of this particular type of business?

A. My reserve that I set up was better than the reserve that they had on the books. The reserve they had was very very small.

Q. Yours was approximately \$13,000 [168] more?

A. Yes, sir.

Q. You set up the reserve or increased the reserve without going to the accounts or without talking to the management or without getting an idea of their prior credit history?

A. If I was to make an audit of the Island Service Company as an independent accountant, I would have gone much, much deeper, not only into the accounts receivable but all the other assets be-

(Testimony of Sherwood Wiseman.)

fore I would have put out a statement of any kind.

Q. If you were examining a statement and found an item in excess of \$4,000 alleged to be owing to the corporation by Corn and Murray written off as a bad debt, would you not have questioned that? A. Yes, sir.

The Court: I have nothing else.

Mr. Crain: (Shakes head).

Mr. Turner: The plaintiff rests.

Mr. Crain: If the Court please, the defendant at this time would move the Court to dismiss the complaint. The complaint is allegedly based upon an agreement entered into between the parties on the 29th day of September, 1952. This agreement calls for certain things to be done and for certain things to be determined prior to the time that a suit might be filed. The evidence that has been presented here has been that an audit took place not pursuant to the terms of this agreement, but that two persons appointed by the two parties to this [169] action prepared two separate audits. Mr. Kaneshiro, the auditor for Mr. Perez, the plaintiff, testified that as far as he knew this audit was still going on and had not come to a conclusion. In addition to the fact that the audit was not conducted in accordance with the terms of the agreement we have the matter of appraisal of the heavy equipment. The agreement sets out a specific manner in which the appraisals shall be made.

The Court: It provides for two appraisers and the selection of a third, doesn't it?

Mr. Crain: It provides for two appraisers and the selection of a third. It further provides that if the two appraisers are unable to agree upon the value of any asset as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final. There is no evidence here that either one of the appraisers—in fact there is testimony to the effect that they never appraised this equipment together, that they never discussed their appraisals and that they merely submitted a separate list of items. I think the Court has also noticed that although substantially they appraised the same list of equipment that there are different omissions in each of the appraisals that have so far been presented to the Court so that none of these appraisals so far before the Court are even reasonably accurate.

The Court: Well, what remedy do you think Mr. Perez is [170] entitled to? You have his stock; you took over the business according to testimony as of October 1, 1952, and ran it to his exclusion.

Mr. Crain: I don't think it was run to his exclusion. He was drawing a salary for two long years for doing nothing.

The Court: Well, as of that date Mr. Hines took over everything and directed the policies and operation and everything else.

Mr. Crain: There has been no testimony——

The Court: In other words, did not Mr. Perez comply with his agreement subject to the conditions subsequent when he turned over his stock to Mr. Hines and the position of the parties was changed

according to the testimony before me. What was Mr. Perez supposed to do? You drew up a complicated formula; it was drawn up by counsel; these parties always had the advice and assistance of counsel. The formula provided that you have two accountants and their determinations would be subject to reconciliation by a third who was not required to make a thorough audit but to reconcile the differences. With the exception of two or three items he succeeded in reconciling those differences. And the agreement further provides that if there is any discrepancy, counsel shall attempt to reconcile the further discrepancies. Counsel had more than adequate time to do that; presumably they were unable to do it.

Mr. Crain: I don't see how the Court can presume when [171] there is no testimony whether they did or not.

The Court: The Court can because we had the pretrial conference in an attempt to reconcile any differences, as it always does, to see if the parties can get together without trial, and it was stipulated that the entire contract was in dispute.

Mr. Crain: The agreement calls for that dispute to have arisen before the filing of an action, not in the judge's chambers at a pretrial conference after the suit had been on file for a number of months.

The Court: It is not at all uncommon that counsel can reconcile their differences after an action has been begun. The motion will be denied.

Mr. Crain: Shall we have a recess before proceeding?

The Court: Yes, we will take a ten-minute recess.

(The Court recessed at 10:30 a.m., October 25, 1955, and reconvened at 10:40 a.m., October 25, 1955.)

The Court: The defense may proceed.

Mr. Crain: With Mr. Turner's stipulation I would like to be the first witness for the defense in order to lay a foundation for Mr. Lathrop's deposition.

Mr. Turner: With reference to the total of the appraisal submitted, it is stipulated between counsel for the plaintiff and defendant that the total amount of Mr. Forkner's appraisal was \$22,349. [172]

The Court: Mr. Lathrop's \$41,036; Mr. Norris' \$34,391?

Mr. Turner: So stipulated.

Mr. Crain: Right.

MR. E. R. CRAIN

counsel for defendant, was duly sworn and testified as follows:

Direct Examination

The Court: Do you want to proceed in a narrative style, subject to objection?

Mr. Crain: Would you permit that?

Mr. Turner: Yes.

Mr. Crain: My name is E. R. Crain. I am an

(Testimony of E. R. Crain.)

attorney at law, licensed to practice in the Territory of Guam and I am counsel for the defendant in this case. Prior to the summer of 1953, two appraisals of heavy equipment and warehoused items of material and equipment had been made by a Mr. Walter Lathrop and a Mr. Spencer M. Forkner, Mr. Lathrop making his appraisal for the plaintiff, Mr. Perez; Mr. Forkner making his appraisal for the defendant, Mr. Hines. Those appraisals had been made late in 1952. The agreement that is in dispute here called for the two appraisers selected by the parties to select a third appraiser to reconcile the differences. Up to the summer of 1953 no such third appraiser had been selected and no third appraisal had been made. During that period of time from October, 1952, to the summer of 1953 there had been a number of discussions between myself and Mr. Turner, counsel for the [173] plaintiff, which had taken place either in Mr. Turner's office or my office or by telephone at such times as Mr. Turner happened to be in Guam. Some of these discussions in the spring and summer of 1953 pertained to the necessity of securing a third appraiser. It was not possible for me, as counsel for the defendant, to go directly to Mr. Walter Lathrop and demand that he join with Mr. Forkner in the selection of a third appraiser. I discussed the matter with Mr. Forkner, hoping that he could get Mr. Lathrop to agree upon a third appraiser, but it is my recollection that during much of that time Mr. Lathrop also was not in Guam. Due to this

(Testimony of E. R. Crain.)

set of circumstances, at a time when Mr. Turner was in Guam in the summer of 1953, I suggested to Mr. Turner, both by telephone and in discussions in his office, that in order to expedite bringing this case to a conclusion that we select a third appraiser. Our discussion went to who was available in Guam that would be competent to be a third appraiser, a man who had experience with heavy equipment and surplus equipment, such as was being appraised here. I suggested Mr. Henry Schwendinger, an employee of the Ellis Company, who had been in Guam many times since approximately 1948 purchasing and shipping surplus military equipment. Mr. Schwendinger was known to Mr. Turner and upon checking it was found that Mr. Schwendinger was on Saipan and came in to Guam at fairly frequent intervals. Mr. Turner and I agreed that at such time as Mr. Schwendinger [174] should come in to Guam it would be permissible for him to make the third appraisal, and on the next date that Mr. Schwendinger was in Guam I asked him if he would perform this service for us. He stated that he would and I gave him a list of the equipment on which blanks were left opposite the individual items, and in the fall of 1953, Mr. Schwendinger made an appraisal and submitted it to my office. When Mr. Turner next returned to the island I discussed this matter in his office, gave him the appraisal that Mr. Schwendinger had made and it was my understanding that he was going to have the appraisal copied and returned to me. Mr. Schwen-

(Testimony of E. R. Crain.)

dinger's appraisal was subsequently returned to me by Mr. Turner a number of weeks later with the information that Mr. Schwendinger's appraisal was unacceptable to his client, Mr. Perez; that Mr. Perez refused to accept the appraisal on the basis that Mr. Schwendinger had not been chosen by the first two appraisers in accordance with the terms of the agreement. Subsequently, without any discussion with me, a fourth appraiser, Mr. Norris, was selected and a fourth appraisal was submitted. As a result of the appraisal made by Mr. Schwendinger and pursuant to a notice of taking his deposition, filed with the Court and served in accordance with the rules, Mr. Schwendinger's deposition was taken and his original appraisal made an exhibit in that deposition and that deposition now is in the file of the Court unopened.

Mr. Turner: Just a minute. [175]

Cross-Examination

By Mr. Turner:

Q. You stated that Mr. Schwendinger's appraisal was made in the fall of '53?

A. That is my recollection.

Q. And that it was not until you presented the appraisal to me that I told you it was unacceptable—as a matter of fact a couple of days thereafter?

A. No, a matter of a couple of weeks thereafter.

Q. I returned the appraisal to you and said it was unacceptable on the basis it was not acceptable to Mr. Perez?

(Testimony of E. R. Crain.)

A. Because Mr. Schwendinger had not been chosen in accordance with the agreement.

Q. I show you a letter of yours and ask you if you recognize it?

A. It would appear that I am several months off in my——

The Court: The question is do you recognize the letter?

A. Yes.

Q. (By Mr. Turner): You wrote that?

A. I did, yes.

Q. And sent it to me? A. Um huh.

Mr. Turner: If there is no objection I would like to have this introduced as Plaintiff's Exhibit next in order.

Q. (By Mr. Turner): You are quite clear in your statement [176] and understanding that it wasn't until that appraisal was returned to you by me several weeks after that you were told Mr. Schwendinger wasn't acceptable?

A. That is my recollection.

Mr. Turner: Show the letter to the Court—Plaintiff's next exhibit.

Q. (By Mr. Turner): Well, then according to that letter you knew on the 21st of June that Mr. Schwendinger was unacceptable to Mr. Perez——

A. That was after his appraisal had been made.

Q. Now, wait. From your correspondence you knew on the 21st of June—— A. 1953.

Q. 1953, that Mr. Schwendinger was unaccept-

(Testimony of E. R. Crain.)

able to Mr. Perez because he was not selected in accordance with the contract, isn't that correct?

A. Right.

Q. And that was several weeks after I had had the appraisal returned to you with the information that he was not acceptable?

A. Right. I would like to correct my testimony. I was confusing the date of Mr. Schwendinger's appraisal with the date of Mr. Norris' appraisal. Mr. Schwendinger's was made in May. Mr. Norris' was made in the fall, about four or five months later.

Q. Just one more question to clear the record. Mr. [177] Forkner did the appraisal under the contract for Mr. Sgro because Mr. Sgro refused to do it?

A. He didn't do it for Mr. Sgro; he did it for Mr. Hines.

Q. I mean Mr. Sgro refused to do the appraisal for Mr. Hines?

A. That is right; he refused to do the appraisal.

Mr. Turner: That is all.

The Court: Just one question.

Examination by the Court

Q. You made reference to Mr. Turner's being off the island. Doesn't Mr. Turner reside in Guam?

A. Well, he resides in Guam but he was not here for a considerable length of time. I think he remembers that, too.

(Testimony of E. R. Crain.)

Mr. Turner: May the clerk open the deposition for the sole purpose of reading the date in Mr. Schwendinger's—

The Court: The deposition hasn't been offered yet.

Mr. Turner: I merely ask, if counsel is willing to stipulate, to having the deposition opened for the purpose of reading the date on the appraisal there.

The Court: We will stipulate as to the date then.

Mr. Crain: I am forced to stipulate that the date is June 22, 1953.

Mr. Turner: On this primary point, your Honor, I will take the stand.

The Court: Just a moment here. [178]

Mr. Crain: Are you my witness?

The Court: This isn't a witness controversy between counsel.

Mr. Turner: I merely wanted to get the deposition—

The Court: The defendant is putting on his case. If you want to testify you will have to testify in rebuttal.

Mr. Turner: You are offering the deposition?

Mr. Crain: Yes.

Mr. Turner: And I am putting on the rebuttal in connection with the admission of it, your Honor.

The Court: Well, now, Mr. Crain's testimony is, whether it is disputed or not, that there was an agreement between counsel that Mr. Schwendinger

(Testimony of E. R. Crain.)

should act as the third appraiser and that he did make an appraisal and that subsequently the plaintiff refused to accept that appraisal upon the ground that it was not made in accordance with the contract. Now in the interest of orderly procedure the Court has to take the testimony as part of the defendant's case. Now as I understand it, you are offering the deposition?

Mr. Crain: I am offering the deposition.

The Court: Now is there any objection to the deposition upon the ground that it was not regularly taken?

Mr. Turner: It was taken on notice, your Honor, no question about that, but my objection goes to its admissibility as to its relevancy to this case under the issues, and that is [179] why I want to put on rebuttal testimony.

The Court: That is not before me at this time. You can subsequently, of course, show in rebuttal that the deposition should not be considered by the Court for any purpose.

Mr. Turner: Well, I would normally think, your Honor——

The Court: But where you have a deposition taken on notice and you have a foundation laid that the appraisal was made pursuant to the agreement of counsel, the Court has no alternative except to receive that deposition for what it is worth.

Mr. Turner: The only question is whether I put mine in on rebuttal or right at this moment for the Court to determine whether it is admissible or not.

(Testimony of E. R. Crain.)

The Court: But that isn't before me at the present time. As long as I have a foundation laid——

Mr. Turner: In other words, you want my rebuttal put on at the close of defendant's case?

The Court: Yes, it has nothing to do, in other words, with the introduction of the deposition. The record will show that counsel have stipulated that the deposition was regularly taken but the plaintiff reserves the right to——

Mr. Turner: Right to object.

The Court: The right to object to its relevancy.

Mr. Turner: You want to take a short recess?

The Court: Well, counsel can step out if they wish. I will just read this. It is further stipulated, of course, that [180] the deposition may be inserted in the transcript without the necessity for having it read into the transcript. Very well, you may proceed.

Mr. Crain: Mr. Hines, will you take the stand, please.

CRISTOBAL C. HINES

defendant, called as a witness in his own behalf,
was duly sworn and testified as follows:

Direct Examination

By Mr. Crain:

Q. Will you state your name, please?

A. Cristobal C. Hines.

Q. Where do you live, Mr. Hines?

A. Tamuning.

(Testimony of Cristobal C. Hines.)

Q. Are you a stockholder in Island Service Company, Inc.? A. I do.

Q. Did you have in your employ, both individually and for Island Service Company, Inc., an accountant by the name of Ireneo Viray?

A. Yes, sir.

The Court: I would like to have this cleared up. Mr. Hines says he is a stockholder. Ordinarily a stockholder doesn't employ people.

Q. (By Mr. Crain): At the present time, Mr. Hines, you not only are a stockholder you are the major stockholder and an officer in Island Service Company, Inc., is that correct? [181]

A. Yes, sir.

The Court: What were you on September 30, 1952?

A. President of the corporation.

Q. (By Mr. Crain): Prior to September 30 what was your position?

A. I was a stockholder prior to September 30.

The Court: Were you an officer in the corporation?

A. After September 30th.

The Court: Didn't you have stock prior to that time?

A. I did.

The Court: Were you an officer then or just a stockholder?

A. To my memory I was a vice president.

The Court: Who managed the company?

A. Mr. Joaquin A. Perez.

(Testimony of Cristobal C. Hines.)

The Court: Did you work in the company at all?

A. No, your Honor.

The Court: In other words, you were vice president and a stockholder but you had nothing to do with the management?

A. No, your Honor.

Q. (By Mr. Crain): At any time, Mr. Hines, during the conduct of the audit of the books of Island Service Company, Inc., that has been testified hereto by Mr. Viray and others, did you instruct Mr. Viray to write off approximately \$36,000 of accounts receivable from the books of the company? [182]

A. No, sir.

Mr. Crain: I have no other questions.

Cross-Examination

By Mr. Turner:

Q. Mr. Hines, isn't it true that after September 30, 1952, you owned all of the shares of stock of Island Service Company, Inc., except the qualifying shares held by the other members of the board of directors?

A. I beg your pardon? Will you repeat?

Q. Since September 30, 1952, have you not owned all of the shares of stock of Island Service Company, Inc., except the three qualifying shares of the other members of the board of directors?

A. To be truthful, I own 72 per cent of the stock.

Q. Did you not after Mr. Joaquin A. Perez con-

(Testimony of Cristobal C. Hines.)

veyed his shares to you, his 25 shares on September 30, 1952, own all of the stock of the corporation?

Mr. Crain: I believe that is 15 shares.

Mr. Turner: 25.

Mr. Crain: 25 or 25 per cent?

A. Would you repeat please?

Q. (By Mr. Turner): At one time, that is on September 30, 1952, right after Mr. Joaquin A. Perez sold his shares to you and conveyed them to you did you not own all of the stock of the corporation? [183]

A. No, sir, not all.

Q. Who else owned some?

A. Some shares goes to Mr. Tomas Flores.

Q. How many shares did he have?

A. I think one share.

Q. One to Finton J. Phelan?

A. Mr. Phelan.

Q. And one to Mr. Arturo Hines and you owned all the rest at that time?

A. Yes, sir.

Q. And Mr. Joaquin A. Perez, pursuant to the agreement of September 29—

The Court: Now do I understand that prior to this agreement, Mr. Hines owned 77 per cent of the stock?

Q. (By Mr. Turner): Well, it is my understanding—you correct me if I am wrong—that at the time you bought Mr. Perez' shares, Mr. Joaquin A. Perez', you owned all of the stock, didn't you, except for the one share that Mr. Phelan had and the one share Mr. Tomas Flores had?

(Testimony of Cristobal C. Hines.)

A. And one share to Arturo Hines.

Q. Isn't it true from September, 1951, to September 30, 1952, you were acting treasurer of the corporation and received a salary of \$300 a month for your services? A. What is that?

Q. Isn't it true that from November, 1951, until September [184] 30, 1952, you were acting treasurer of the corporation, Island Service Company?

A. Yes, sir.

Q. And correcting my previous question—you received a salary of \$350 a month for that position, didn't you? A. I think so, yes.

Q. You signed checks of the corporation?

A. Countersigned.

Q. Who?

The Court: Who signed the checks?

A. Mr. Joaquin A. Perez and myself.

Q. Then you countersigned? A. Yes, sir.

Mr. Turner: I think that is all the questions I have.

Redirect Examination

By Mr. Crain:

Q. During that same period of time, November, 1951, to September, 1952, although you held the position of acting treasurer you still did not take any active part in the management of the Island Service Company, Inc., did you? A. No, sir.

Q. Is it correct, Mr. Hines, that shortly before September 30 or September 29, 1952, that as a result of the confusion in the management of Island

(Testimony of Cristobal C. Hines.)

Service Company, Inc., you bought out two other major stockholders? [185]

A. To be correct, three.

The Court: When was this?

Mr. Crain: Shortly before September 29, 1952.

Q. (By Mr. Crain): And prior to the time you bought them out what was your percentage of share interest in the corporation, if you recall?

A. I can't recall.

Q. Did you own over half of the stock before you bought those other three stockholders out?

A. No.

Q. It was less than half?

A. No, I only owned 15 shares before I bought the other three.

Mr. Crain: That is all.

Examination by the Court

Q. 50 shares is exactly half, isn't it?

A. 15, your Honor.

Q. 15? A. Yes, your Honor.

Recross-Examination

By Mr. Turner:

Q. Just one question. After October 1, 1952, you have been in active charge of the corporation?

A. Yes, sir.

Mr. Turner: That is all. [186]

Mr. Crain: That is all.

(Testimony of Cristobal C. Hines.)

Examination by the Court

Q. Mr. Hines, you bought out Mr. Joaquin A. Perez, did you not? A. Yes, sir.

Q. And you have the stock certificate, do you?

A. I believe it is in Mr. Crain's office.

Q. But it was delivered to you?

A. I believe it's still in Mr. Crain's office.

Q. And Mr. Perez was the manager of the company up until September 30, 1952?

A. Yes, your Honor.

Q. And you were the acting treasurer?

A. Yes, your Honor, by appointment by Mr. Perez.

Q. And you received \$350 a month?

A. \$325 to my memory.

Q. \$325—what did you do for the \$325 a month, Mr. Hines? A. I received that as my salary.

Q. And what did you do to earn it? I mean did you spend some time each day at the company?

A. I am taking charge of the cash.

Q. Of the deposits of the cash?

A. Yes, sir.

Q. Did you extend credit?

A. No, your Honor. [187]

Q. In other words, were the bookkeepers under your direction? A. No, your Honor.

Q. You just handled the cash, made the deposits and countersigned checks?

A. Yes, your Honor.

(Testimony of Cristobal C. Hines.)

Q. You had nothing to do with ordering or payment, except to sign the checks?

A. No, your Honor.

The Court: Very well. Thank you.

Mr. Turner: I might ask one question.

Re-recross-Examination

By Mr. Turner:

Q. You haven't paid Mr. Joaquin A. Perez any money or anything for his stock so far, have you?

A. Not yet.

Mr. Turner: That is all.

Mr. Crain: That is all. We rest, your Honor.

The Court: Now Mr. Turner.

Mr. Turner: Will you stipulate I can testify in narrative form?

Mr. Crain: Certainly.

MR. LYLE H. TURNER

counsel for plaintiff, was duly sworn and testified in rebuttal as follows: [188]

Direct Examination

Mr. Turner: To summarize and shorten the testimony, what Mr. Crain has stated that Mr. Lathrop and Mr. Forkner had been unable to select a third appraiser as late as the early spring of 1953 is correct. Mr. Crain, to my recollection, called me on the telephone and asked me whether I felt Mr. Hank Schwendinger would be acceptable as a third

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(Testimony of Lyle H. Turner.)

appraiser, and to the best of my recollection, I stated that I would get in touch with Mr. Joaquin A. Perez and ascertain whether Mr. Schwendinger was acceptable. To the best of my recollection, Mr. Perez advised me that he would not be acceptable because he had business dealings with Mr. Forkner and he therefore questioned whether he would be disinterested. I therefore advised Mr. Crain that Mr. Schwendinger would be unacceptable and they would have to have a third appraiser under the contract. Subsequently Mr. Lathrop came to my office and stated that they had selected a third appraiser and I prepared the typed statement which has been presented as a plaintiff's exhibit and it was subsequently returned to me signed by both Mr. Lathrop and Mr. Forkner, designating Mr. Norris as a third appraiser. I have no recollection of ever receiving a copy of Mr. Schwendinger's appraisal, but I distinctly do remember returning the appraisal to Mr. Crain's office in about three weeks' time and telling him that Mr. Schwendinger was not acceptable as an appraiser. The communication was communicated [189] to him as soon as Mr. Perez advised me Mr. Schwendinger would be unacceptable and, as the record shows, it was prior to the actual appraisal.

Examination by the Court

Q. You do not believe you ever saw the appraisal?

A. I will state it as a positive fact.

(Testimony of Lyle H. Turner.)

Q. You heard Mr. Crain's testimony that he made out a list of equipment so that all the appraiser had to do was put his values in?

A. I thought that it was written in pencil, not a typewritten list.

Q. That is the question I am getting at, but your recollection is that you were not in agreement with Mr. Crain as to the appointment of Mr. Schwendinger?

A. Well, I would have to get Mr. Perez' consent to it. I did not feel I could bind him. At least it is not my custom to bind a client without getting approval of it.

Q. Even though your agreement is to the contrary? A. Well, you mean in the contract?

Q. The contract provides that it is discretionary with the two appraisers.

A. You mean as far as the attorneys go under the contract?

Q. Yes, is there any requirement in the contract that the client should agree to the selection of the third appraiser?

A. Oh, no, the third appraiser under the contract was to be [190] selected by the two. To deviate from that I felt would be a breach of contract and I would have to get Mr. Perez' approval as to any substitution.

Q. In other words, if the two appraisers had made the selection there would have been no question but since the appointment of Mr. Schwendinger

(Testimony of Lyle H. Turner.)

ger was at variance with the terms of the contract, you felt you had to get Mr. Perez' approval?

A. That is right.

Cross-Examination

By Mr. Crain:

Q. Actually that is a question I was going to ask. We are not trying to reconstruct something that happened two and a half years ago. However, you stated that the letter of authorization signed by Mr. Forkner and Mr. Lathrop, selecting Mr. Norris as the third appraiser, was prepared by your office after——

A. No, Mr. Lathrop came to my office and said, "Mr. Forkner and I are in a position to select a third appraiser. Will you prepare a written letter of appointment."

Q. But I think you said, you previously testified that Norris was going to be the man?

A. No, I don't think—to the best of my recollection, I didn't know who they were going to appoint.

Q. Isn't it correct that from approximately October of 1952, until the late fall of 1953 that you were off the island [191] for protracted periods, that you were traveling considerably?

A. If I remember correctly, let's say, in the late fall—I went on vacation from about June to August, and I think I was pretty well back on the island for almost all of the time after that, but I do know that Lathrop and Forkner had difficulty in getting a third appraiser because there weren't too

(Testimony of Lyle H. Turner.)

many people in Guam that knew that particular business.

Q. Actually, Mr. Lathrop was traveling too?

A. He was going to Manila.

Q. I believe that Mr. Stevens came to your office in July, 1953, and from that time until Mr. Norris made his appraisal you were also off the island considerably.

A. I had gone on leave—I think Russ came in '52.

Q. Mr. Schwendinger was known to you as a dealer or a dealer's agent in the purchase and sale of equipment over a considerable period of time?

A. I had prepared Mr. Schwendinger's tax returns and I knew from information developed from that that he worked for the Ellis Company and dealt in surplus.

Q. Also at the time he made the appraisal I believe he was on loan to a client of yours, Micronesia Metal Company of Saipan?

A. I wouldn't know. The only time he was in the office was to consult on **income tax, that is all.**

Q. But you knew him to be competent? [192]

A. Oh, yes, I knew him to be in the surplus business.

Q. I believe that the testimony both of us have given here has been quite approximate as to exact dates and places?

A. I just merely know I felt that I did advise you that he was unacceptable to Mr. Perez prior to the actual taking of the appraisal, according to that

(Testimony of Lyle H. Turner.)

exhibit, but it's all approximate because we are both dealing with our recollections.

Q. It could have been written up several days after?

A. It doesn't look like it to me because that exhibit looks like something that was written out in the field because it's in rough pencil, and I think he signed it after he took it.

The Court: Do you have any idea, Mr. Crain, why this wasn't prepared on the form you said you made up?

Mr. Crain: The only reason I could say—we furnished him the form and he went ahead and copied the items with his figures after them.

Mr. Turner: On page 12 of the deposition he says it isn't his writing on there, that it was written down as he called the stuff off, the material off, when he made the appraisals. He called it off to somebody else who wrote it down.

The Court: He testified, of course, that he made the appraisal either the same day or within two days after he talked with you. Presumably that was one of the occasions when Mr. Turner was on the island? [193]

Mr. Crain: We hope so, or he was coming or going.

Mr. Turner: No, I was here because of that letter.

Mr. Crain: Well, my writing the letter wouldn't be conclusive that you were on the island.

The Court: Do you have further rebuttal?

(Testimony of Lyle H. Turner.)

Mr. Turner: No, that is all. I am renewing my objection to the deposition, and I think we submit the case.

The Court: I would like to have counsel prepared to argue this matter at 1:30.

Mr. Turner: We are submitting the case without argument unless your Honor wants it.

The Court: Well, I think we should have a discussion here unless you would rather stipulate or by stipulation meet with me in chambers?

Mr. Crain: I would prefer that.

The Court: I think there are a number of factors which we could take into consideration which do not deal exclusively with evidence.

Mr. Crain: Right.

The Court: So I will meet you in chambers at 1:30, it, of course, being understood that the purpose of that is an informal discussion and it is not binding upon either party.

Mr. Crain: Thank you, sir.

The Court: The Court will recess until 1:30 and this deposition, of course, has been introduced and accepted in [194] evidence.

(The court recessed at 11:55 a.m., October 25, 1955, and reconvened at 9:30 a.m., October 26, 1955.)

The Court: Both sides have rested in this case. Do counsel have any argument?

Mr. Turner: No, we submit the case without argument.

Mr. Crain: No, sir.

The Court: Very well. The evidence in this case shows that on the 29th day of September, 1952, there was in existence in Guam a corporation known as the Island Service Company, Inc. That corporation had issued 100 shares of stock, having a par value of \$600 per share. Plaintiff in this case was the owner of 25 shares of stock, and the defendant in this case desired to acquire the 25 shares, as a result of which the plaintiff and the defendant entered into an agreement dated September 29, 1952, setting forth the basis upon which payment would be made for the plaintiff's 25 shares. That agreement contemplated that both parties would select auditors who would make an audit of the corporate assets and that heavy equipment owned by the corporation should be appraised by independent appraisers; that after a figure was agreed upon payment would be made in accordance with the agreement. At the outset it should be pointed out that ordinarily an audit of the type contemplated and the required appraisals should have been completed three months after the agreement was entered into, but it was [195] permitted to extend over a much longer period of time. The Court is of the view and so holds that this delay was largely due to the failure of the auditor selected by the defendant, and under his control as an employee, to perform his share of the work in a reasonable period of time. The auditor selected by the plaintiff testified that his work was substan-

tially completed in a short while after he was requested to perform the work. The agreement provided that if there was no meeting of minds on the basis of the audits and appraisals, that counsel would attempt to resolve any difficulties. The agreement further provided that the determination of the auditors should be subjected to adjustments by a third and independent accountant. All of this was done although in part not strictly in accordance with the terms of the agreement. The agreement further contemplated that the matter should be presented to the Court on those points of disagreement, and in the pretrial order counsel stipulated that the entire agreement was in dispute, so the Court is faced with the responsibility for making a complete determination. If counsel will make notes, the Court finds the issues in this case joined in favor of the plaintiff and against the defendant. It finds that the balance sheet which was introduced as Plaintiff's Exhibit 6 and which was prepared by Mr. Wiseman, the accountant, correctly states the reconciliations or the agreements between the two auditors insofar as there was agreement. Current assets—the Court [196] accepts Mr. Kaneshiro's conclusion that the cash on hand was \$20,047.40. Notes receivable, which are not in dispute, in the amount of \$850. As to accounts receivable the Court has no acceptable evidence before it as to the collectibility of these accounts as of October 1, 1952 except the accounting practice used, which was to take the accounts receivable and set up a sizable reserve for bad debts. The setting up of this reserve appar-

ently was sound accounting practice and was agreed to by the two auditors. The Court therefore finds that the accounts receivable are \$53,548.74. The inventory of merchandise presents little dispute. The Court accepts Mr. Kaneshiro's figure of \$48,506.65, which is slightly less than Mr. Viray's figure. The inventory value of new cars is not in dispute, that figure being \$11,489.33. Now let us total that figure before we proceed. The Court gets a figure of \$134,442.12. Fixed assets consist of the buildings, the value of which is not in dispute, in the sum of \$21,616.59. The Court finds the value of the office equipment to be \$188.75 and the value of furniture and fixtures to be \$736.58. Aside from the accounts receivable, the principal item in dispute is the appraised value of the equipment. That appraisal, obviously, was to reflect market value. In all instances the appraisers considered market value in terms of their own experiences and their own interests. Market value is normally that amount which would be paid by a buyer dealing at arm's length to a seller also [197] dealing at arm's length. The Court must consider this value as of October 1, 1952. There are four appraisals. Mr. Forkner's in the amount of \$22,349; Mr. Lathrop's in the amount of \$41,036; Mr. Norris' in the amount of \$34,391 and Mr. Schwendinger's in the amount of \$11,329. Now the Court received Mr. Schwendinger's deposition in evidence but does not feel that his appraisal was based upon true market value. It was based exclusively upon the value to his company, assuming that all of the heavy equipment involved

was to be transported to the United States to be sold as useable equipment or as parts. Mr. Forkner is in the salvage business and so was Mr. Lathrop to some extent. The Court feels that, in accordance with the agreement, Mr. Norris' appraisal most nearly meets the test which the parties established in that he was selected by the first two appraisers, his appraisal was completely independent of their determinations; at no time was there a joint meeting or effort at reconciliation. The Court is not entitled to guess and it therefore finds that Mr. Norris' appraisals is the most nearly accurate of any of those made and is in accordance, substantially, with the agreement and therefore finds the value of the equipment at \$34,391. The Court therefore finds that total as \$56,932.92. Merchandise in transit is not in dispute but there is the \$400 dispute. The Court takes Mr. Kaneshiro's figures which are less because his audit is dated a day later. His lesser figure will therefore be reflected in part at least [198] in the increased cash on hand which the Court accepted; that is, \$34,489.64. The prepaid insurance, prepaid expenses and deposits are not in dispute. Those are, respectively, \$728.44, \$545.28, and \$1,700, or a total of \$2,973.72. In adding those figures of assets the Court gets the total figure of \$228,838.40.

Mr. Turner: I have 538.

The Court: You get what?

Mr. Turner: 228,538.

The Court: Check your totals—56,932.92; 134,442.12; 34,489.64; 2,973.72.

Mr. Turner: Oh, that is where my mistake was. Thank you. That is right.

The Court: \$222,838.40 representing the assets. Under notes payable there is a discrepancy between the two auditors of \$3,300. There was some evidence before the Court as to a note payable to the plaintiff which is in dispute. The Court does not therefore feel that it should consider that note for any purpose at this time since it represents a claim against the corporation and if valid, the plaintiff is at liberty to collect, so under liabilities current the Court accepts Mr. Viray's figure of \$13,659.15. Drafts payable—there is a discrepancy here but in view of the fact that some drafts may have been paid—I don't know—I will accept Mr. Kaneshiro's figure of \$41,369.67. Accounts payable are in agreement, \$4,697.11. Accrued items are in agreement in the amount of [199] \$2,228.17. As to current liabilities therefore the Court has a figure of \$61,954.10. Does that check?

Mr. Crain: I must have missed one.

The Court: 13,659.15; 41,369.67; 4,697.11; 2,228.17.

Mr. Crain: Oh, I am sorry; I see my error.

The Court: The reserve for income tax is not in dispute, \$10,903.79; capital stock, \$60,000. The court gets a figure of \$132,857.89.

Mr. Turner: That is 132,000?

The Court: 132,857.89. Is that correct?

Mr. Crain: Right.

Mr. Turner: That is right.

The Court: Deducting 132,857.89 from 228,-

838.40, the court gets an earned surplus of \$95,-980.51. Is that your figure, Mr. Turner?

Mr. Turner: Yes, sir.

The Court: Under the terms of the agreement the plaintiff is entitled to one-fourth of that amount, which the court has as \$23,995.12.

Mr. Turner: 99 what?

The Court: \$23,995.12. Have you checked on that?

Mr. Crain: I have checked.

The Court: Is that correct?

Mr. Turner: That is the figure I get.

The Court: \$23,995.12. In addition to which he is [200] entitled to the par value of his stock in the amount of \$15,000, or a total amount of \$38,995.12. Judgment will therefore be entered in favor of the plaintiff against the defendant in the amount of \$38,995.12. The question now confronting the court is as to whether paragraph 4 of the agreement is to be followed in connection with the payment of this judgment. Ordinarily there would be no question in the court's mind but that this agreement was entered into on the 29th day of September, 1952. and normally should have been consummated, even including litigation, within a year from that date, in which event under the terms of paragraph 3, the plaintiff would have received the full amount contemplated under paragraph 4 of the agreement. In other words, he normally would have been fully paid a year ago. Now the question which the court presents to counsel is whether judgment should be entered in this amount or whether a judgment

should be entered in compliance with paragraph 4. The court will first hear from the plaintiff.

Mr. Turner: Without presenting the court any particular authorities on the subject, I would off-hand feel that unless this defendant was found to be in breach of the contract that the judgment should be rendered for payment pursuant to the contract, but the point might well be fully researched.

The Court: Mr. Crain, what are your views?

Mr. Crain: The only comment that I would have would be that the judgment of the court now is the determination of the [201] actual value as was called for by the contract.

The Court: And an appropriate judgment.

Mr. Crain: Yes, that part of paragraph 4 which refers to the 12 payments doesn't set forth the fact that they were to be monthly.

The Court: For purposes of appeal I don't think it makes any difference as long as the judgment is entered. Judgment will be entered in accordance with paragraph 4 of the agreement on the basis of a payment of \$15,000 within 15 days from today.

Mr. Crain: From today, your honor, or from entry of the judgment?

The Court: Well, the clerk's notes will show a judgment entered. Formal judgment will simply reflect that and the amount of \$23,995.12 is then to be paid in 12 equal monthly installments beginning what time after the \$15,000 is paid?

Mr. Crain: 90 days.

Mr. Turner: 90 days.

The Court: 90 days. The plaintiff will prepare Findings of Fact, Conclusions of Law and settle with the defendant in 10 days and the plaintiff will also prepare a satisfactory judgment. Any further matters to come before the court?

The Clerk: No further matters, your honor.

The Court: The court will stand adjourned until tomorrow morning at 9:30 a.m.

(The court adjourned at 10:50 a.m., October 26, 1955.) [202]

District Court of Guam,
Territory of Guam—ss.

I, Dorothy L. Wilkins, Official Court Reporter for the District Court of Guam, hereby certify the above and foregoing to be a true and correct transcript of the stenographic shorthand notes taken in the above-numbered case at the said time and place as set forth.

/s/ DOROTHY L. WILKINS,
Official Court Reporter.

[Title of District Court and Cause.]

Civil No. 27-55

CERTIFICATE OF CLERK

I, Roland A. Gillette, Clerk of the District Court of Guam, for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint—filed 4-19-55.

2. Stipulation—filed 5-11-55.
3. Notice of Motion to Dismiss—filed 5-31-55.
4. Stipulation—filed 7-8-55.
5. Answer—filed 7-18-55.
6. Pretrial Order—filed 8-30-55.
7. Notice of Taking Deposition—filed 10-1-55.
8. Bond for Costs on Appeal—filed 11-9-55.
9. Notice of Appeal—filed 11-9-55.
10. Motion for Settlement of Findings of Fact, Conclusion of Law and Judgment—filed 11-23-55.
11. Findings of Fact and Conclusions of Law—filed 12-16-55.
12. Judgment—filed 12-16-55.
13. Statement of Points—filed 12-23-55.
14. Designation of Record on Appeal—filed 12-23-55.
15. Certified copy of Supersedeas Bond—filed 12-23-55.
16. Ex Parte Order—filed 12-31-55.
17. Notice of Appeal—filed 1-3-56.
18. Bill of Costs—filed 1-5-55.
19. Writ of Execution with Marshal's return endorsed thereon—filed 1-11-56.
20. Notice of Motion—filed 1-16-56.
21. Designation of Record on Appeal—filed 1-16-56.
22. Statement of Points—filed 1-16-56.
23. Certified copy of clerk's Minutes.
24. Transcript of Proceedings.
25. Deposition of Walter Lathrop.
26. Deposition of Henry G. Schwendinger.

27. Plaintiff's Exhibits 1-5, inclusive, and 7-10, inclusive.

28. Defendant's Exhibits A and B.

are the original or certified copies of the documents filed in the above-entitled case.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 7th day of February, A.D. 1956.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk of the Court.

[Endorsed]: No. 15078. United States Court of Appeals for the Ninth Circuit. Cristobal C. Hines, Appellant, vs. Joaquin A. Perez, Appellee. Transcript of Record. Appeal for the District Court of Guam, Territory of Guam.

Filed: February 9, 1956.

Docketed: March 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15078

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

1. The court erred in refusing to dismiss this cause upon motion made and argued that the court was without jurisdiction of this cause.

2. The court erred in excluding the appraisal of equipment made by Henry D. Schwendinger.

3. The court erred in the measure of damages applied inasmuch as there had been no joint audit of the books of the corporation as required by the agreement relied upon by defendant-appellant.

4. The court erred in accepting the partial reconciliation of Sherwood Wiseman of the separate audits of Ireneo Viray and Stanley Kaneshiro where the agreement relied upon called for a complete reconciliation by a third auditor of the joint audit.

5. The court erred in ordering judgment to be entered by the clerk on October 26, 1955, when judgment was not docketed until December 16, 1955.

6. The court erred in ordering that its judgment entered on the 16th day of December, 1955, be entered nunc pro tunc as of the 14th day of November, 1955.

7. The court erred in entering its judgment on the 16th day December, 1955, when it had not yet settled or filed its findings of fact and conclusions of law in the cause, which findings of fact and conclusions of law were settled and filed on the 19th day of December, 1955.

8. The court erred in ordering that its findings of fact and conclusions of law filed by it on the 19th day of December, 1955, be entered nunc pro tunc as of the 14th day of November, 1955.

9. The court failed to make findings of fact sufficient to support its conclusions of law and judgment.

Dated: March 9th, 1956.

Respectfully submitted,

/s/ THOMAS M. JENKINS,
Attorney for Appellant.

[Endorsed]: Filed March 10, 1956.

No. 15,078

IN THE

United States Court of Appeals
For the Ninth Circuit

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANT'S OPENING BRIEF.

E. R. CRAIN,

Aflague Building, Agana, Guam,

THOMAS M. JENKINS,

625 Market Street, San Francisco 5, California,

Attorneys for Appellant.

FILED

AUG 30 1956

PAUL P. O'BRIEN, CLERK

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No. 15,078

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CRISTOBAL C. HINES.

Appellant.

VS.

JOAQUIN A. PEREZ.

Appellee.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

Appellee brought this action against appellant in the District Court of Guam for the Unincorporated Territory of Guam to recover the sum of \$40,767.07 allegedly due him under a written contract with appellant (2-4).^{*} Jurisdiction of the District Court of Guam for the Unincorporated Territory of Guam is vested in that Court by the Organic Act of Guam, 48 USC 1421. The case was tried without a jury before the Honorable Paul D. Shriver, Judge of the District

^{*}References are to pages in the Transcript of Record on file herein.

Court of Guam for the Unincorporated Territory of Guam. On October 26, 1955, the Court rendered its oral decision in favor of appellee (27). Premature Notice of Appeal was filed by appellant on November 9, 1955 (14). Findings of Fact and Conclusions of Law were signed by the Court and entered in the Civil Docket on December 16, 1955, *nunc pro tunc* as of November 14, 1955 (15-22). Judgment for appellee in the sum of \$38,995.12 was entered on December 16, 1955, *nunc pro tunc* as of November 14, 1955 (22-23). On January 3, 1955, appellant filed his Notice of Appeal (24). The jurisdiction of this Court is invoked under the Organic Act of Guam, 48 USC 1424a.

STATUTES INVOLVED.

Constitution of the United States.

Art. III, Sec. 1

“The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .”

Art. I, Sec. 8, Clause 9

“The Congress shall have Power . . . to constitute Tribunals inferior to the Supreme Court.”

Art. IV, Sec. 3, Clause 2

“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”

The Organic Act of Guam, 48 USC 1424a

“There is created a court of record to be designated the ‘District Court of Guam’, and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have, in all causes arising under the laws of the United States as such court is defined in section 451 of Title 28, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam.”

Federal Rules of Civil Procedure

Rule 52

“(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a

master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948. (b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment of court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

Rule 58. Entry of Judgment

"Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for

other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. As amended Dec. 27, 1946, effective March 19, 1948.”

STATEMENT OF THE CASE.

This is an appeal by defendant-appellant from a judgment for plaintiff-appellee in the sum of \$38,-995.12. The action was brought by plaintiff Joaquin A. Perez for damages for breach of a contract for the sale of corporate shares owned by him and sold to defendant Cristobal C. Hines. Defendant's motion to dismiss the case for failure to state a claim was denied and he thereupon filed his answer.

ISSUES.

The issues presented by this appeal are:

1. Should the District Court have granted appellant's motion to dismiss the action on the ground that it was premature?
2. Did the District Court err in failing to find on a material issue of fact?
3. Did the District Court err in directing that the interest on the judgment should commence prior to the date of the entry of judgment?

4. Did the District Court err in assessing costs against appellant?

5. Did the District Court err in granting judgment when the cause of action alleged in the complaint was not proved?

STATEMENT OF FACTS.

Appellee, Joaquin A. Perez, was the vice president and a stockholder in the Island Service Company, a Guam corporation, hereinafter referred to as the corporation. He agreed to sell his 25 shares of stock, par value \$25.00 per share, to appellant, Cristobal Hines. A written agreement of sale was drafted, executed and dated September 29, 1952. At the time of the drafting and execution of the agreement both parties were present represented by counsel (33-34).

The contract provided that the purchase price of the stock would be the actual value as that term was defined by the agreement. Paragraph 3 (a) of the agreement provided as follows:

“The term ‘actual value’ as used herein shall be determined as follows:

“(a) Hines hereby designates Ireneo Viray, and Perez hereby designates Stanley Kaneshiro, which two individuals will jointly audit the books and records of Island Service Company, Inc. from the inception thereof, to and including October 1, 1952. After said joint audit has been completed, Robert Wiseman shall review the results of said audit and shall attempt to reconcile any differences that may have arisen therein.

After such review the results of said audit shall be presented to Crain and Phelan and Lyle H. Turner, the attorneys for the respective parties. In the event any difference of opinion should result between said counsel as a result of said audit, either party hereto shall have the right to take said difference of opinion into any Court with jurisdiction thereof in order that said difference may be resolved. Any such recourse to Court will be limited to resolving any difference that the parties hereto have been unable to resolve.” (5-6)

The agreement also provided that the value of all fixtures except fixtures attached to the realty which were not mechanical contrivances should be determined by two appraisers, one selected by each party. Paragraph 3 (e) provided as follows:

“All other fixtures, including rolling stock, mechanical fixtures attached to realty, etc., shall be valued at their actual value as of October 1, 1952. For the purpose of determining said actual value, Perez shall select an appraiser, and does hereby select Jack Lathrop, subject to the right to substitute another appraiser in the event said Jack Lathrop does not agree to act as appraiser or is otherwise unavailable, and Hines shall designate an appraiser on or before Friday, October 3, 1952. In the event said two appraisers are unable to agree upon the value of any asset, as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final.” (7)

Pursuant to the request of appellee’s attorney, Kaneshiro conducted an audit of the corporation and

prepared a balance sheet as of September 30, 1952 (41-42). Viray conducted an audit and prepared a balance sheet as of September 29, 1952 (69-70). Viray took over a year to complete his audit (68). Kaneshiro completed his audit in "a very short time". He went through the records and waited for Viray to catch up (60). The two auditors reached different results on nearly every item on the respective balance sheets, e.g. cash on hand and in banks (70, 43), accounts receivable (73, 44) inventory, merchandise (76, 45), inventory, automobiles (77, 45), buildings (77, 48), office equipment (79, 47), furniture and fixtures (79, 47), notes payable (83, 50), accounts payable (82, 49) and drafts payable (82, 50). Viray determined the actual value of the corporation to be \$79,601.91. Kaneshiro determined the actual value of the corporation to be \$121,228.67 (18-19).

Pursuant to a request to attempt to reconcile the differences in Kaneshiro's and Viray's audits, Sherwood Wiseman met with the two auditors about 5 times (121-122). Wiseman did not look at the books of the corporation because it was agreed before he "went into this contract" that he would not (178). He discussed with the two auditors the various items of their respective balance sheets and the data supporting them. Wiseman made 6 adjusting entries to Kaneshiro's audit and 19 adjusting entries to Viray's audit (124, 128, 132). He also added to both balance sheets a note receivable of \$850.00 which had not been on the books and accrued income tax in the sum of \$10,903.79, neither of which items had previously appeared on either balance sheet (127). After Wise-

man's adjustments, the actual value as shown on Viray's balance sheet was \$155,625.95 and the actual value as shown on Kaneshiro's balance sheet was \$152,833.02 (19).

Meanwhile, Lathrop, appointed by appellee, and Forkner, appointed by appellant, each made separate and independant appraisals of fixtures not attached to the realty. Forkner appraised the value of the assets at \$22,349.00 and Lathrop appraised their value at \$41,036.00 (18).

By summer of 1953, no third appraiser had been selected to reconcile the differences in the two appraisals (187). Crain, appellant's attorney and Turner, appellee's attorney, had several discussions concerning the necessity of securing a third appraisal. Crain suggested to Turner that in order to expedite bringing the matter to a conclusion they select a third appraiser. The two attorneys discussed the men who would be competent to make the appraisal who were at that time available in Guam. Crain suggested Henry Schwendinger as a third appraiser. Turner and he agreed that the next time that Schwendinger was in Guam, he would make the third appraisal. Crain, therefore, asked Schwendinger to make the appraisal. Schwendinger made an appraisal in the amount of \$11,329.00 and submitted it to Crain who, when Turner next returned to Guam, discussed the matter with him and gave him Schwendinger's appraisal. A few weeks later, the appraisal was returned to Crain by Turner who told him that his client, appellee, refused to accept the appraisal (187-189).

Thereafter, Lathrop told Turner that he and Forkner had selected a third appraiser. Norris, that appraiser, made a separate and independent appraisal. He did not discuss with Forkner and Lathrop their appraisals or see their reports either before or after the time that he made his appraisals (202, 161). Norris appraised the value of the assets at \$34,391.00 (18).

The Court found the value of the assets in accordance with Norris' appraisal. He stated that he rejected Schwendinger's appraisal because he felt that it did not reflect the true market value of the assets (210).

The Court made a separate finding on each item of the balance sheets and determined the actual value of the corporation to be \$155,980.51 (20).

ARGUMENT.

I.

**THE DISTRICT COURT SHOULD HAVE GRANTED APPELLANT'S
MOTION TO DISMISS THE ACTION ON THE GROUND OF
PREMATURITY.**

The action by appellee for breach of contract was premature because the conditions precedent to suit as expressed in the contract of the parties had not been met at the time that the action was filed. Under the contract either party had the right to take any difference of opinion to the Court only after the contract procedures for ascertaining the actual value of the shares had been followed. At the time of the filing of the present action there had been no compliance with those procedures.

Appellee's complaint alleged a breach of contract and prayed damages therefor. He alleged that he had demanded the alleged actual value of the shares (\$40,-767.57) from appellant and that he had refused to pay it (4). Appellant moved to dismiss the complaint on the ground that the methods provided in the contract for the ascertainment of the value of the shares had not been followed (183). Until the methods for the ascertainment of the value of the shares were complied with, appellant was not liable under the contract to pay the purchase price. Before appellant's liability to pay the purchase price had arisen, there could be no breach of contract. Appellee's action was premature and the Court should have granted appellant's motion to dismiss.

It is a well settled rule of law that an action may not be maintained until the cause of action accrues and that if the action is commenced before that time, it must be dismissed on the ground of prematurity.

Adams v. Albany, 80 F. Supp. 876, 881;

American Bonding & Trust Co. v. Gibson County, 145 F. 871, 874;

Berkowitz v. Palm Springs La Quinta Develop. Co., 37 C.A. 2d 249, 99 P. 2d 372, 373.

An action to recover the purchase price under a contract of sale must be dismissed if, at the time of the commencement of the suit, conditions precedent to the payment of the purchase price have not been met.

Tatum v. Ackerman, 148 Cal. 357, 83 P. 151, 153.

It is elementary in the law of contracts that before a conditional contract may become operative, its conditions must have been performed.

As the California Supreme Court held in *McKenzie v. Scottish Union & National Insurance Co.*, 112 C. 548, 44 P. 922, when a condition precedent is adopted by parties in their agreement, Courts will exact a substantial if not a strict observance of the conditions before ordering a judgment thereon (Cited in *Peterson v. Montgomery Holding Co.*, 89 C.A. 2d 890, 202 P. 2d 365).

When parties contract, and place conditions in their agreement, their agreement can only be consummated in the event of the existence of those facts called for in the agreement. If those conditions do not come about, there can be no agreement as the parties initially contemplated. There can be a new understanding, but that would bring into being a different contract. No one can acquire rights under a promise, which in terms is conditional, unless the condition happens or is performed.

Lober v. Canadian Pac. Rej. Co., 151 F. 2d 758, Cert. Den. 66 S. Ct. 490, 326 U.S. 797, 90 L. ed. 485 (CCA Minn.).

What conditions were not fulfilled prior to the filing of this action?

First, the contract provided that Viray and Kane-shiro should "jointly audit" the books and records of the corporation (6). Although Kaneshiro did testify to the conclusion that his audit was made "jointly" with Viray (41) and although the testimony of

the two auditors is in conflict in regard to how much they cooperated in their separate audits of the books, it is clear that no joint audit as was contemplated by the contract was ever made.

The work "joint" is defined as "done or produced by two or more working together".

Webster's New International Dictionary, 2nd ed.;

Arndt v. Brockhausen, 3 A. 2d 384, 386;

Barr v. Missouri Pacific R. Co., 37 S.W. 2d 927, 930.

The two auditors failed to produce an audit, working together. Their separate audits took different periods of time to conduct, they covered different periods of time and each auditor made separate balance sheets with divergent conclusions. Viray testified that they each conducted two separate audits working alone, that each came up with separate results and that when he showed his results to Kaneshiro, the latter did not agree with him (96-98). Mr. Viray (96) stated: "He made his audit and I made my audit. I mean, he worked alone and I worked alone, but we worked in one office at the same time". Mr. Kaneshiro (60) stated, "I went through the records and arrived at certain figures and waited for Mr. Viray to catch up." To say in the face of the testimony by the two auditors that there was a joint audit would be ridiculous.

There must be certainly more cooperation between two people for a concurrence of action. Moreover, cooperation was imperative because of the peculiar facts of this case.

Mr. Kaneshiro was intimately connected with the so-called books of the corporation. Mr. Viray was an outside accountant as far as knowledge of the corporate records went. And, most important of all, the records were incomplete, according to the testimony of both Viray and Kaneshiro. It may be true that Mr. Kaneshiro could get all the information he wanted regarding the corporate finances from the books as he claimed, but it would have been all but impossible for even the most competent certified public accountant to conduct a fair audit without explanation of the missing supporting data.

Despite this situation when Mr. Viray found differences, Mr. Kaneshiro gave no explanation, he only "disagreed with me." (99).

There was, therefore, no joint audit as the parties must have contemplated it. But the Court failed to find on the issue of whether or not a joint audit was conducted. It merely found that the two accountants audited the books of the corporation (18).

As a second condition precedent, the contract provided that "after said joint audit has been completed, Robert Wiseman shall review said audit and shall attempt to reconcile any differences that may have arisen therein". Even granting that the audits were joint, the reconciling accountant, Wiseman, could not have but noticed the disparity in the two conclusions. Viray's audit was \$79,601.91; Kaneshiro's \$121,228.67. There was more than a \$40,000.00 difference!

Notwithstanding that \$40,000.00, Wiseman used Kaneshiro's audit as a control. He made no attempt

at a real reconciliation. He merely took for granted that Kaneshiro's audit was correct because Kaneshiro had the more thorough knowledge of the Island Service Company's books. With that bias, a third party could not make a fair evaluation of the two audits.

He could only go through both audits and, in effect, substitute in the "incorrect audit" the figures of the "correct" audit.

This is exactly what Wiseman did. He did not go back to the original books to check even the great disparities. He adjusted Viray's to fit Kaneshiro's. He did not question the parts of both audits rendered obscure by the paucity and, in cases, complete lack of records. He merely resolved every difference in the audits in favor of Kaneshiro. The contract did not give Wiseman the authority to change items in the balance sheet which were not in dispute. Contrary to the direction in the contract of the parties, Wiseman added to each balance sheet items which had not been on either auditor's balance sheet previously and deleted items which both had previously included in their respective balance sheets. The contract certainly did not contemplate that Wiseman should reconcile the differences between the auditors in such a manner that after his "reconciliation", the net worth of the corporation would be nearly \$30,000.00 more than either auditor had determined before reconciliation.

If this were a reconciliation, it certainly was not one that could possibly have been contemplated by Mr. Hines at the time he entered into the contract.

Third. The contract further contemplated that when the result of the audit was presented to the respective counsel of the parties, they should try to reconcile any differences. No such attempt was made.

Fourth. The contract contemplated that the two appraisers selected by the parties should appraise each item together and that, in the event that they should not agree on the correct appraisal to be given any item, the value of that asset should be presented for the decision of the third appraiser. Instead of following the contract, the two appraisers each conducted an independent appraisal of the assets, without the benefit of the knowledge of the opinion of the other appraiser. As was inevitable under such a procedure, their results were not identical. Therefore, it was necessary to have a third appraiser. The third appraiser, instead of comparing the appraisals of the other two upon disputed items, made a complete, independent appraisal of all assets. If such a procedure was what was contemplated by the contract, it would not have provided for the first two appraisals.

Since the methods provided in the contract for the determination of the actual value of the corporation had not been followed at the time of the filing of the complaint, there was, therefore, neither a strict nor a substantial observance of the conditions of the contract as would entitle a Court to render a judgment on the contract (cf. *McKenzie v. Scottish Union & National Insurance Company*, 112 C. 548, 44 P. 922). At that time appellant was not yet liable to pay anything and he did not breach the contract in failing to

pay the sum appellee demanded. Since a cause of action for breach of contract had not accrued, the Court should have granted appellant's motion to dismiss on the ground of prematurity. It was not the Court's proper function to disregard the contract of the parties and make his own evaluation of the actual value of the corporation, at a figure higher than each of the figures of the two auditors.

The trial Court substituted a different set of conditions for those stipulated in the contract.

The Court was without authority to make such a substitution. Contracting parties are entitled to the method of appraisal as provided for in the contract and any decree of the Court not in conformance therewith amounts to a modification of the vested rights under the contract. *Luedinghaus Lumber Co. et al. v. Luedinghaus et al.*, 299 F. 111, 9th Circuit.

The appellant, therefore, was entitled to a dismissal of the action.

II.

THE COURT ERRED IN FAILING TO MAKE FINDING ON MATERIAL ISSUES OF FACT.

Rule 52(a) of the Federal Rules of Civil Procedure requires that "in all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon . . ."

Findings of fact on every material issue are mandatory and there must be such subsidiary findings of

fact as will support the ultimate conclusion reached by the Court. *Kweskin v. Finkelstein*, 223 F. 2d 677, 678. The trial Court's findings should be so explicit as to give the reviewing Court a clear understanding of the basis of the trial Court's decision and to enable the reviewing Court to determine the grounds upon which the trial Court reached its conclusions. *Maher v. Hendrickson*, 188 F. 2d 700; *Irish v. United States*, 225 F. 2d 3, 8.

The failure to find an ultimate fact is deemed a finding against the party having the burden of proof, and, on appeal, all facts not embraced in special findings will be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens*, 166 F. 2d 659, 667.

The Court failed to make findings on three material issues:

1. The issue of whether or not counsel for the parties, as the agents of the parties, had succeeded in making an executed oral modification of the written contract when they agreed that they would select a third appraiser and selected Schwendinger who then made the appraisal.

2. The issue of whether or not Kaneshiro and Viray conducted a "joint audit".

3. The issue of whether or not there was ever a breach of the contract. (This latter issue is one of ultimate fact.)

On the evidence before it, the Court could have found that counsel for the parties, as the agents of

the parties, had made an executed oral modification of the written contract when they agreed that they would select the third appraiser, and selected Schwendinger who made the appraisal.

A contract in writing may be altered by a contract, in writing, or by an executed oral agreement, and not otherwise. *Guam Civil Code*, Section 1698.

Crain, attorney for appellant, testified that he and Turner, attorney for appellee, agreed that they would select the third appraiser in order to bring the matter to a conclusion, that they agreed upon Schwendinger as the appraiser, that Schwendinger then made his appraisal, and that after the appraisal was submitted to Turner, Schwendinger was rejected. Turner had been acting for appellee in all phases of the negotiation and execution of the contract of sale of the stock. It could be inferred that he had authority to make such a modification of the contract. Even lacking actual authority, it could have been found that he had apparent authority to do so.

A principal is bound not only by the acts of his agent which he has actually authorized, but also by those acts which he has allowed third persons to believe him authorized to perform. *Hicks v. Wilson*, 197 Cal. 269, 240 P. 289, 290.

If Crain had not relied upon Turner's apparent authority to make such a modification, he could have obtained appellee's consent before the appraisal was made and before appellee saw the low appraisal made by Schwendinger.

Turner's testimony, of course, was somewhat inconsistent with Crain's, but if the Court had believed Crain's version of the occurrence, it could have found that by oral modification Schwendinger was the third appraiser. Once the contract had been modified to provide that the attorneys would choose the third appraiser, the other two appraisers no longer had the authority to select a third appraiser in the absence of Crain's agreement to their selection. The Court misinterpreted its function in regard to the third appraiser. It was not to judge the appraisement, as it did. Because the contract provided that the third appraiser's decision was to be final, the only function of the Court was to determine which as between Norris and Schwendinger was properly selected as the third appraiser. This the Court failed to do. Instead, the Court selected Norris' appraisement because he felt that it more truly reflected market value. The Court erred in failing to find which of the two men was properly selected as the third appraiser.

The Court also erred in failing to find whether or not a joint audit had been conducted by Kaneshiro and Viray. Such a joint audit was a condition precedent to the ascertainment of the purchase price of the shares. Therefore, it was a material issue of the case.

The Court further failed to find on the issue of breach of contract. Since breach of contract was an ultimate fact, it must be deemed a finding against appellee who had the burden of proof on the issue.

III.

THE DISTRICT COURT ERRED IN DIRECTING THAT INTEREST ON THE JUDGMENT SHOULD COMMENCE PRIOR TO THE DATE OF ITS ENTRY.

Interest on a judgment is calculated "from the date of the entry of the judgment". *Federal Rules of Civil Procedure*, Rule 58.

The Court's judgment ordered appellant to pay interest at the rate of 6% if the sum of \$15,000.00 was not paid on or before November 10, 1955. The judgment was entered on December 16, 1955, *nunc pro tunc* as of *November 14, 1955*, four days after the date for the commencement of interest (22-23). The Court had no power to order interest to be paid on the judgment prior to the date of its entry.

IV.

THE DISTRICT COURT ERRED IN AWARDING COSTS TO APPELLEE.

The Court awarded costs in the sum of \$645.23 to appellee (23). Appellant moved for a review of the action of the clerk in taxing costs. The Court, after reviewing the costs, ordered that costs should be allowed as taxed by the clerk (29).

Costs should be allowed to "the prevailing party". *Federal Rules of Civil Procedure*, Rule 54(d).

Appellee was not the prevailing party. Appellant has never disputed the fact that he owed appellee a sum of money equal to the actual value of the shares nor that the actual value should be determined as

provided in the contract. The dispute between the parties concerned which sum of money was the actual value of the shares as determined as provided in the contract. Appellee alleged in his complaint that the actual value was \$40,767.57 (3-4). The Court determined that he was incorrect and that the actual value was \$38,995.12 (21). Therefore, appellee did not prevail on the only issue in dispute between the parties to the action. Neither party prevailed.

When neither of the parties to an action prevails, neither is entitled to an award of costs. In *Hart v. Casterton*, 227 N.W. 183, 184, the Court, in construing a statute providing that costs should be awarded to the "prevailing party", held that where neither party to the action was wholly successful, neither was the prevailing party and neither was entitled to costs. See also *McCrary v. New York Life Ins. Co.*, 84 F. 2d 790, 795, where the Court held that a beneficiary under a life insurance policy who sued for double indemnity and who recovered the face value of the policy less a loan on it, which amount had been tendered by the insurer before the suit, was not the "prevailing party" and was not entitled to costs.

The Court in *Lueben v. Metten*, 100 P. 2d 935, 937, described the reason for awarding costs as follows:

"Costs are said to be in the nature of incidental damages allowed to the successful party to indemnify him against the expense of asserting his rights in court, when the necessity for so doing was caused by the other's breach of legal duty."

It was not appellant who caused the necessity of having the Court determine the actual value of the shares. That necessity was caused by the inability of both parties to agree. Appellee's demand was of a sum in excess of that determined by the Court to be the actual value of the shares.

V.

APPELLEE DID NOT RECOVER UPON THE CAUSE OF ACTION ALLEGED IN HIS COMPLAINT.

In his complaint appellee alleged a cause of action for breach of contract and prayed damages therefor. The proof failed to show a breach of contract. The District Court awarded appellee either specific performance or declaratory relief, contrary to the complaint and to the contract of the parties.

CONCLUSION.

For the reasons above stated it is respectfully submitted that the judgment appealed from should be reversed.

Dated, San Francisco, California,
August 24, 1956.

Respectfully submitted,

E. R. CRAIN,

THOMAS M. JENKINS,

Attorneys for Appellant.

No. 15,078

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CRISTOBAL C. HINES,

Appellant,

vs.

JOAQUIN A. PEREZ,

Appellee.

Appeal From the District Court of Guam, Territory of Guam.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

ARGUMENT.

Appellant, in his opening brief, completely ignores the two central, critical facts of the case, which, in themselves, answer all the arguments advanced by appellant. These facts are the following:

1. Appellant Himself Breached and Frustrated the Performance of the Contract Between the Parties.

The only question presented by the contract between the parties and the instant suit was and is the value of the shares sold by appellee to appellant. A principal item in that determination was the value of the accounts receivable owned by the corporation. Naturally, the more the accounts receivable were worth, the more appellee would

be entitled to, and conversely, the less the accounts receivable were worth, the less appellee was entitled to receive from appellant. The parties realized the temptations this presented and sought to resolve their anticipated difficulties by providing in the contract that:

“Accounts receivable shall be evaluated in accordance with standard accounting methods as said accountants and auditor may agree upon by majority vote. In reaching said determination said accountants shall use a standard accountants’ handbook accepted by the American Society of Accountants, or a like national society.” [Tr. p. 6.]

Both accountants, Kaneshiro representing appellee and Viray representing appellant, testified that while the parties to this action were shareholders in the corporation, and prior to the execution of the agreement, a reserve had customarily been set up for bad debts. [Tr. pp. 63, 106.] Both accountants further testified that it was sound accounting practice to provide for such reserve. [Tr. pp. 63, 106, 117. See also 176-177.] In spite of this accepted procedure and the earlier practice of the corporation, appellant, in violation of his agreement with appellee, ordered Mr. Viray, his accountant, to write off all debts which were not acknowledged by the debtors to whom routine letters of inquiry had been sent. [Tr. pp. 94, 104, 107.] See transcript, pages 116 through 120, where Mr. Viray testified that Mr. Hines had given him direct orders to depart from the standard he (Mr. Hines) had agreed to with Mr. Perez. As the Court below stated at page 120 of the transcript, “He (Mr. Viray) said he did these things because Mr. Hines told him to do them and that it wasn’t good accounting practice to do it.” That this departure was deliberate and made only for the purpose of defeating

appellee's rights under the contract is clearly demonstrated from the fact that immediately following the audit the corporation resumed the reserve method for treating bad debts. [Tr. p. 106.]

Appellant breached and frustrated the performance of the contract in still another way. Mr. Kaneshiro, the auditor appointed by appellee, completed his audit "in a short while after he was requested to perform the work." [Tr. pp. 60, 209.] Mr. Viray, however, dragged his feet. The Court below placed the blame for this situation upon appellant, stating from the bench [Tr. p. 208]:

"At the outset it should be pointed out that ordinarily an audit of the type contemplated and the required appraisals should have been completed three months after the agreement was entered into, but it was [195] permitted to extend over a much longer period of time. The Court is of the view and so holds that this delay was largely due to the failure of the auditor selected by the defendant, and under his control as an employee, to perform his share of the work in a reasonable period of time."

The foregoing in itself is sufficient refutation of appellant's contentions (1) that "he did not breach the contract" and (2) that "appellant has never disputed the fact . . . that the actual value should be determined as provided in the contract." (App. Op. Br. pp. 16, 21-22.) We will presently deal with these contentions in more detail. Suffice it to say at this point that appellant's entire argument is predicated on the contention that there was no breach of contract on the part of appellant, which contention, as we have seen, is utterly devoid of merit. This brings us to the second main factor in the case which appellant has ignored or overlooked.

2. Appellee Was Entitled to Judgment in the Court Below Even Though There May Not Have Been a Technical Breach of Contract.

Even if we ignore appellant's deliberate breach of contract as testified to by his own accountant, appellee nevertheless would be entitled to a judgment. Appellant predicates his argument, in large measure, on the contention that appellee was not entitled to recover because there had been no breach of contract. This contention is erroneous both in fact (as we have already shown) and in law.

When the parties entered into their contract, they understood that any method they would adopt for determining the value of the shares sold would create difficulty since the issue was a complex one. They therefore provided for two accountants of their own choosing to attempt an evaluation of the business. [Tr. pp. 5 and 6.] They then provided that if the two accountants could not agree, their differences should be submitted to a third accountant, Robert Wiseman. [Tr. p. 6.] If the parties were still not in agreement, the matter then would be submitted to the attorneys for the respective parties. [Tr. p. 6.] Then if the attorneys could not agree, the matter was to be submitted to a court of competent jurisdiction. This last provision is set out in the contract as follows:

“In the event any difference of opinion should result between said counsel as a result of said audit, either party hereto shall have the right to take said difference of opinion into any Court with jurisdiction thereof in order that said difference may be resolved.

Any such recourse to Court will be limited to resolving any difference that the parties hereto have been unable to resolve.” [Tr. p. 13.]

From the foregoing it is plain that there need not have been a technical breach of contract for either party to invoke the jurisdiction of the court. It was sufficient that the accountants and the attorneys could not agree; the court could then resolve any remaining differences.

At the pretrial conference, counsel for both parties agreed and stipulated that “The parties have been unable to reconcile their differences and the entire contract is in dispute.” [Tr. p. 13.]

Accordingly, since the entire contract was in dispute and since the court, by agreement of the parties, had jurisdiction over “any difference that the parties hereto have been unable to resolve,” all of the issues arising out of the contract were properly before the court without reference to the question whether either party had breached the contract.

We respectfully submit that the foregoing, in itself, is sufficient refutation of every argument made in appellant’s opening brief. We will nevertheless treat each argument raised by appellant with particularity to show that even accepting the arguments made by appellant without reference to these underlying defects there is no merit whatsoever in those contentions.

I.

The Court Below Properly Refused Appellant's Motion to Dismiss the Action on the Ground of Prematurity.

Appellant argues that the action filed by appellee "for breach of contract was premature because the conditions precedent to suit as expressed in the contract of the parties had not been met at the time that the action was filed." (App. Op. Br. p. 10.) As we have already stated and shown, a breach of contract was not necessary to confer jurisdiction upon the court. Nevertheless, there is no merit to appellant's argument that the supposed conditions precedent had not been met.

A. Appellant contends, initially, that "The two auditors failed to produce an audit working together." (His Brief, p. 13.)

We have been unable to find any definition of "joint audit" in any available authority. Appellant, however, seems to take the position that the parties contemplated that both accountants would sit down together and wrestle with each entry until they came to a joint understanding and finally a single audit. We doubt that any accountant would care to support such a definition of the term; and certainly the parties themselves did not contemplate such a procedure. The parties agreed that Mr. Wiseman should adjust the differences between the accountants. Apparently, then, the parties did not expect the single audit that appellant now contends he was entitled to; otherwise, what reason would there have been for a third accountant to reconcile the separate audits made by the two accountants? Apparently this was the understanding of the accountants themselves, for they both testified that they did, in fact, prepare a "joint audit" as they under-

stood the term. Both Mr. Kaneshiro and Mr. Viray testified that they worked together and prepared a joint audit, contrary to appellant's contention. In support of these assertions, we respectfully direct the Court's attention to the following quotations from the Transcript:

Mr. Kaneshiro (appellee's accountant):

At p. 44:

"Q. Were any of those items jointly verified by you and Mr. Viray? A. It was, sir.

* * * * *

Q. Now, we have here the original books and records of Island Service Company, Inc., and if you need to refer to any of those, we will do so. The accounts receivable is listed as \$69,767.24. Can you kindly tell the court how that figure was reached?

A. The accounts in the record were checked to arrive at the figure.

Q. Was that a joint check by you and Mr. Viray? A. That is right."

* * * * *

At p. 45:

"Q. You have 'Inventory-Merchandise,' \$48,506.65. Will you state to the court how that figure was reached? A. The inventory, the actual physical count was taken by a representative of Mr. Hines, and Mr. Viray and I did the pricing on the extensions and additions and the figure is the actual figure that we arrived at."

* * * * *

At p. 46:

"Q. Who actually figured the cost on both of those two inventories? A. It was done jointly.

Q. By whom? A. Ireneo Viray and myself."

* * * * *

At p. 47:

“Q. And you have a reserve for depreciation of \$61.25. How did you determine that? A. We estimated the life of the equipment throughout the [19] year that had expired and made a calculation as to the length of life of the equipment for five years since the time of purchase and we divided the cost by five to arrive at the amount of depreciation.

Q. When you say ‘we,’ who do you mean? A. Mr. Viray and I.

Q. Was that depreciation schedule jointly agreed upon by you and Mr. Viray? A. I am not sure about that, sir, but the procedure was agreed upon.”

* * * * *

At p. 48:

“Q. And you have listed a reserve for depreciation on furniture and fixtures of \$108.42. How did you arrive at that figure? A. We estimated the life of the furniture and fixtures and determined the expired portion.

Q. Now when you say ‘we,’ you mean you and Mr. Viray? A. That is right, sir.

Q. You have buildings listed as \$26,651.92. I refer you to Plaintiff’s Exhibit 2: ‘Fixtures attached to the realty, excluding mechanical contrivances, shall be valued at cost to the corporation, depreciated to October 1, 1952, which depreciation shall be over the period of the lease of the corporation of the premises upon which the corporation is located,’ and ask you how you reached that figure of \$26,651.92 for the buildings? A. We checked the record to arrive at the actual cost of the buildings.”

* * * * *

At p. 49:

“Q. And you have a reserve for depreciation of \$4,882.82. How did you reach that figure? A. It was jointly agreed between Mr. Viray and myself.”

* * * * *

At p. 51:

“Q. Now, as I understand it, in figuring these liabilities on the accounts payable that was an actual joint check of the records? A. That is right.”

* * * * *

At p. 53:

“Q. And the statement so filed reflected that net profit for the nine months? A. Just a moment. I retract, sir. That is the surplus we determined that we filed with the Government of Guam, sir.

Q. And who is ‘we’? A. Mr. Viray and I determined that. It is the amount that was on the record as of September 30, 1952.

Q. As being the net profit of the corporation for the nine months of 1952? A. That is right.”

* * * * *

At p. 54:

“Q. Did you and Mr. Viray in your joint audit use standard accounting methods? A. Yes, sir.

Q. Did you and Mr. Viray, of your own personal knowledge, have conferences with Mr. Sherwood Wiseman subsequent to the audit? A. Yes, sir.

Q. I will ask you whether during these conferences and as a result of those conferences with Mr. Wiseman you and Mr. Viray jointly agreed to certain adjusting entries to be made by Mr. Wiseman? A. That is right.

Q. You agreed to those adjusting entries? A. That is right.

Q. Did Mr. Viray in your presence agree to them? A. That is right."

* * * * *

At p. 55:

"Q. You have testified that this was a joint audit? A. That is right.

Q. Conducted by yourself and Mr. Viray. Now that is not true, is it? You and Mr. Viray conducted your audits for the most part separately? A. No, sir, for the most part together. We arrived at our own findings and reconciled them."

* * * * *

At p. 60:

"Q. Now, in the final analysis, there was not a joint audit between you and Mr. Viray? A. There was, sir. We conducted an audit as of September 30."

* * * * *

At p. 62:

"Q. Do I understand that you worked independently on your figures in the audit and Mr. Viray did and on some of them you worked together? A. That is right.

Q. This balance sheet represents the results of your audit—the figures upon the items where you and Mr. Viray agreed and where you disagreed they represent your findings? A. That is right."

* * * * *

Mr. Viray (appellant's accountant):

At p. 78:

“Q. There is a difference between your and Mr. Kaneshiro's figures. Could you kindly state to the court how you reached your total of \$17,250? A. I do not remember now how this was established, but I do remember we made an agreement on the buildings that the figures he had and I had which were the same.”

* * * * *

At p. 86:

“Q. Now, leaving aside all the differences, other differences, between you and Mr. Kaneshiro, let me ask you if you prepared your audit pursuant to the instructions contained in the joint memorandum? A. Yes, sir.

Q. And did you use standard accounting methods in that? A. Yes, sir.

Q. Let me also ask you if subsequent to your audit you had any meetings and discussions with Mr. Sherwood Wiseman and Mr. Stanley Kaneshiro in resolving any of the differences between your audit and Mr. Kaneshiro's audit? A. Yes, sir.

Q. Where were those meetings held? A. I do not remember now, sir, but I believe we held meetings more than three times.

Q. And were you and Mr. Kaneshiro present at those meetings? A. Yes, sir.

Q. Let me ask you were you in agreement and was Mr. Kaneshiro in agreement when Mr. Wiseman made adjustments? Were they acceptable to both of you? A. Yes.”

* * * * *

At p. 109:

“Q. Isn't it also true that in your conferences with Mr. Wiseman, that is the conferences between Mr. Kaneshiro and yourself, all of the differences between the balance sheet of 29 September, 1952, and the one of June 23, 1954—the major differences which you have discussed and testified to—they were resolved and reconciled? A. Yes, sir.

Q. And you accepted Mr. Wiseman's adjustments to both your balance sheet and Mr. Kaneshiro's balance sheet? A. I did.

Q. Now, just to clear up a minor item, you said that you and Mr. Kaneshiro conducted your audits together? A. He did his separately.

Q. They were both in the same physical location and they went on at the same time chronologically speaking? A. Yes.

Q. Isn't it true he and you discussed certain items and agreed upon them, such as inventory of merchandise? A. We discussed various items and agreed on some and some we didn't.”

B. Appellant next contends that Mr. Wiseman, the accountant who was to reconcile the two statements, “made no attempt at a reconciliation,” and accuses Mr. Wiseman of “bias” because he did not go back to the original books. (App. Op. Br. pp. 14-15.)

Again, the contract between the parties did not specify how the reconciliation was to be made. The accountants, however, were all satisfied that the reconciliation was honestly and properly made. We have already quoted from the Transcript at page 54 and page 109 where both Mr. Kaneshiro and Mr. Viray stated that they were satisfied with the reconciliation (*supra*). In this connection, we might add that had there been any question whatsoever

that the reconciliation was not being made in accordance with the understanding between the parties, it is only fair to assume that Mr. Viray, who was then employed by appellant, would have reported to appellant, who in turn would have raised the issue long before or even at the trial.

In addition to the portions of the Transcript already quoted showing that both accountants accepted the procedure followed by Mr. Wiseman, see the following additional pages in support of the same proposition: 103, 107, 133 and 179.

To bury appellant's complaint that Mr. Wiseman "did not go back to the original books" completely and finally, we should like to call the Court's attention to Mr. Wiseman's testimony at page 178 of the record where he testified that he was directed by the parties not to go back to the books of the corporation but to limit himself to reconciling the differences in the two audits.

Certainly, in view of the foregoing, appellant has no basis for complaint about the services rendered by Mr. Wiseman.

C. Appellant next complains that counsel for the parties did not make any attempt to reconcile the differences between the parties as the parties contemplated when the contract was entered into. (App. Op. Br. p. 16.)

Here, again, the record does not support the contention. The Court below specifically found that "Counsel for plaintiff and defendant agreed that the respective counsel for the two parties were unable to reconcile the differences upon the actual value of the corporation and that the entire contract was in dispute." [Tr. p. 19.] This finding is predicated on an express stipulation between counsel

at the pretrial hearing [Tr. p. 13] which the Court properly construed to mean that the attorneys could not adjust the differences between them. [See Tr. pp. 134-135 and 185.] In any event, as late as the pretrial conference, when an attempt was made by the Court to get an agreement between counsel, no such adjustment was possible.

D. Next, appellant complains that the third appraiser "made a complete, independent appraisal of all assets" instead of comparing the appraisals of the other two appraisers. (His Brief p. 16.)

This, indeed, is a peculiar twist. As we already pointed out, when appellant objected to Mr. Wiseman's reconciliation of the audits made by the other two auditors, he complained, in his Opening Brief at page 14, that Mr. Wiseman did not go back to the original books and instead relied on the audits prepared by Mr. Viray and Mr. Kane-shiro. Here he goes off in the opposite direction and complains that the third appraiser made an independent appraisal rather than relying upon the appraisals already made. This is characteristic of the arguments submitted by appellant.

Actually, the method used undoubtedly was within the agreement of the parties, for when appellant, through his attorney, retained the services of Mr. Schwendinger, Mr. Schwendinger did exactly what Mr. Norris did as the third appraiser. Acting on the instructions of Mr. Crain, attorney for appellant, he made an independent appraisal, precisely the procedure followed by Mr. Norris in this case. [Tr. pp. 188-189.] It therefore hardly lies in appellant's mouth to complain about the procedure followed.

II.

The Findings Are Sufficient to Support the Judgment.

Here, again, appellant predicates his argument that the findings are not sufficient, on the erroneous premise that appellee could not recover unless he established a breach of contract. He missed again the essential point that the entire contract was in dispute, and the determination of the value of the stock was before the Court without reference to the question of a breach of contract. As the Court below properly stated [Tr. p. 209]:

“The agreement further contemplated that the matter should be presented to the Court on those points of disagreement, and in the pretrial order counsel stipulated that the entire agreement was in dispute, so the Court is faced with the responsibility for making a complete determination.”

But even on appellant's own premise, the findings are sufficient. The “primary and basic test of the adequacy of findings is whether they are sufficiently comprehensive and pertinent to the issues in the case so as to provide a basis for purposes of decision.” (*Shapiro v. Rubens* (9 Cir.), 166 F. 2d 659, 665.) The findings in this case meet that test. The findings are complete and comprehensive on every essential issue presented for decision.

Appellant complains, at page 18 of his Brief, about the failure to make three findings in particular. None of them presents a substantial question.

A. Appellant contends that the Court should have found whether attorneys had orally modified the contract of the parties.

There was no evidence at all to support the contention that there was a modification of any kind. Appellant argues that Mr. Schwendinger's appraisal was made after counsel had agreed to his appointment. As a matter of fact, Mr. Turner, representing appellee, testified, at page 202 of the Transcript, that he advised Mr. Crain, attorney for appellant, that Mr. Schwendinger was "unacceptable and, as the record shows, it was prior to the actual appraisal." Mr. Turner had reference to a letter advising Mr. Crain of this fact dated prior to the appraisal. While Mr. Crain testified originally to the contrary, when confronted with documentary evidence, he admitted [Tr. p. 191] that he had been confused and wished to correct his testimony.

Be that as it may, appellant has been unable to show that either attorney had power to bind his client by modifying the agreement without the client's consent. Such a power, is generally beyond the scope of the duties of an attorney at law. Compare Section 283 of the Code of Civil Procedure of the State of California.

Moreover, as the Court below found, Mr. Schwendinger's appraisal was without meaning to the parties to this action because "It was based exclusively upon the value to his company, assuming that all of the heavy equipment involved was to be transported to the United States to be sold as useable equipment or as parts." [Tr. pp. 210-211.] Specific findings on this issue, therefore, would have been without any point whatsoever.

In any event, the contract was complied with to the letter without modification. The contract provided that

“In the event said two appraisers are unable to agree upon the value of any asset, as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final.” [Tr. p. 7.] Consistent with this authority “said two appraisers appointed James Norris as the third appraiser and he appraised the value of said assets as \$34,391.00.” [Tr. p. 18.] The court below accordingly found “the value of said appraised assets to be \$34,391.00 in accordance with the appraisal of said James Norris.” [Tr. p. 18.] Of more immediate interest, however, is the fact that the exact contractual procedure was followed by the parties, as set out above, “*about four or five months*” after the parties had supposedly modified the contract. [Tr. p. 191.] Certainly, then, there can be no substance to the complaint of appellant that the court failed to find whether the contract had been orally modified when the parties, themselves, did not treat the contract as having been modified or changed.

B. Appellant next complains that there was no finding whether the accountants had made a joint audit.

While it is technically true that in Finding No. 6 [Tr. p. 18] the Court did not state that the books and records were “jointly” audited, nevertheless:

1. The record amply shows, as we have demonstrated above, that the audit was joint;

2. The Court did find that the accountants “agreed to certain adjustments to their computations to be made by Wiseman” [Tr. p. 19], so the defect, if any, was cured by the complete agreement among Mr. Viray, Mr. Kane-shiro and Mr. Wiseman;

3. As we have already shown in our opening statement, if there was no joint audit, appellant himself frustrated the joint audit by making a demand on Mr. Viray not con-

sistent with the terms of the agreement. Having instructed his accountant to disregard standard accounting procedures which he agreed to follow, and having permitted his accountant to take over a year to complete an audit which appellee's accountant finished in three months, it is with poor grace that appellant now complains that there was no joint audit or finding to that effect. Appellant should not be allowed to complain that a condition precedent, which he himself frustrated, was not complied with.

C. Appellant next complains that there was no finding whether the contract had been breached.

We have discussed several times above the proposition that breach of contract was not necessarily an issue before the Court, it being sufficient that the elaborate procedures set out in the contract for resolving the differences were unworkable. To this the parties had already stipulated.

Generally, in connection with all of these alleged omissions, even if appellant were technically correct that such findings were omitted, he still has failed to show any reversible error. "The duty of the trial court to make findings of fact should be strictly followed. But such findings are not a jurisdictional requirement of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here." (*Hurwitz v. Hurwitz*, App. D. C., 136 F. 2d 796, 799, 148 A. L. R. 226, 229.)

In this connection, see also *Wells Fargo Bank & Union Trust Co. v. Imperial Irrigation District* (9 Cir.), 136 F. 2d 539.

III.

The District Court Did Not Err in Directing Interest to Be Paid From November 10, 1955.

In contending that the Court erred in ordering interest to be paid from November 10, 1955, appellant again completely misunderstood the import of the order of the Court below. The Court was merely complying with the agreement of the parties in directing interest to be paid in the manner stated and was not awarding interest on the judgment. The contract between the parties provided that the first payment from appellant to appellee should be due 15 days after "actual value" of the shares was determined. [Tr. p. 8.] Since the Court, sitting as an umpire by agreement of the parties, made its determination of actual value on October 26, 1955, the first payment was due on November 10, 1955, and was delinquent immediately thereafter. [See Tr. pp. 27-28, 208-215.] Therefore, interest was due and payable to appellee on and after that date regardless of when the judgment was entered. Appellant's argument, therefore, is completely meaningless and misses the point in its entirety.

Even at that, appellant was favorably treated by the Court below. Appellant, as we have shown, deliberately delayed the determination and time of payment, and the Court should have ordered interest to run from the day the first payment would have been due but for the breach of the contract on the part of appellant.

IV.

The District Court Did Not Err in Awarding Costs to Appellee.

Again, appellant predicates his argument on the erroneous thesis that appellant had not breached the contract and on the further erroneous contention that a breach of contract was necessary to substantiate appellee's case.

Even if that were not so, appellee is clearly the "prevailing party" within the meaning of Rule 54(d) of the *Federal Rules of Civil Procedure*. The "prevailing party" is the party in whose favor judgment is or should be entered. (See cases collected at 33 *Words and Phrases* (Permanent Edition), 512 *et seq.*) Clearly, for all the reasons explained above, appellee was properly before the Court and properly entitled to judgment, and therefore within the rule of *Lueben v. Metten*, 100 P. 2d 935, 937, quoted as follows at page 22 of Appellant's Opening Brief:

"Costs are said to be in the nature of incidental damages allowed to the successful party to indemnify him against the expense of asserting his rights in court, when the necessity for so doing was caused by the other's breach of legal duty."

V.

The Recovery Was Within the Issues Set Out in the Complaint.

Appellant complains, finally, that appellee failed to establish a breach of contract in accordance with the allegations of the complaint. Again, the argument is fallacious. The complaint pleaded the contract in its entirety and alleged failure to pay on the part of appellee. As a matter of fact, as the Court and the parties understood, the parties had exhausted the procedures set out in the contract. Noth-

ing more remained to be done except to submit the differences, and by stipulation this included the whole contract, to the judgment of the Court. The case was fully and properly presented on that theory, all available testimony and evidence was submitted, and the case tried without any recorded objections of any sort on this point. Finally, judgment was entered in accordance with the complaint.

Conclusion.

Appellant, by his own act and deed, prevented and delayed the accountants from arriving at a determination in accordance with his own agreement with appellee. The only recourse available to appellee under the contract was to the Courts. Consistent with the agreement of the parties, the Court made the final determination after listening to the evidence in its entirety. We therefore respectfully submit that the judgment of the Court below should be affirmed.

If the Court should find any technical defect in the form of the findings of fact and conclusions of law, even then the judgment should not be reversed but merely remanded to the trial court for more adequate findings without retrial.

Perry v. Bauman (9 Cir.), 122 F. 2d 409;

Paramount Pest Control Service v. Brewer (9 Cir.), 177 F. 2d 564;

Gillis v. Gillette (9 Cir.), 177 F. 2d 7.

Dated: October 12, 1956.

Respectfully submitted,

SPIEGEL, TURNER & STEVENS,
Attorneys for Appellee.

No. 15,078

IN THE

United States Court of Appeals
For the Ninth Circuit

CRISTOBAL C. HINES,

Appellant,

VS.

JOAQUIN A. PEREZ,

Appellee.

On Appeal from the District Court of Guam for the
Unincorporated Territory of Guam.

APPELLANT'S CLOSING BRIEF.

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No. 15,078

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CRISTOBAL C. HINES,

VS.

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Appellant,

Appellee.

**On Appeal from the District Court of Guam for the
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APPELLANT'S CLOSING BRIEF.

**I. APPELLEE NEITHER BREACHED NOR FRUSTRATED
THE CONTRACT BETWEEN THE PARTIES.**

The appellee states that the only question presented by the contract was and is the value of the shares sold by the appellee to the appellant (Appellee's Brief, page 1). The appellant admits that. But, the appellant submits that the main point of the suit is the manner at which the share value was arrived.

The contract was a conditional one. It recited certain conditions; among them were the provisions for the computation of accounts receivable and the value of the various properties of the corporation. The

appellant promised to pay for the shares what the shares were worth, if their value was arrived at by a certain method. If this method was not followed, the condition would be unfulfilled and the contract not operative.

Peterson v. Montgomery Holding Co., 89 Cal. App. 2d 890, 202 P. 2d 365.

Appellee has contended that appellant "frustrated" the performance of the contract in two particulars: (a) writing off bad debts and (b) length of time for completion of audit.

It is submitted that neither of these contentions have any validity although both are of an extremely minor nature and would not in any way be proof of the appellee's contention, even if true. Appellant's accountant, Viray, followed a procedure which is common in verification of most corporation audits, of verifying the accounts receivable prior to fixing their value. There is no testimony that this was not in accordance with the standards set up by the American Society of Accountants and as a matter of fact, as is within the judicial knowledge of this Court, is standard practice.

Appellant's accountant took a considerably longer period to complete his audit than did appellee's. As previously pointed out, however, the books of the corporation were in a completely chaotic state, and there was necessity on the part of Viray, appellant's accountant, to reconstruct them prior to submitting his report. The same was not true of Kaneshiro, appellee's accountant, who had set up the system.

It is indeed difficult to see how these two minor points could, as stated by appellee, "answer all arguments advanced by appellant."

II. APPELLEE COULD NOT PREVAIL IN HIS SUIT IN THE ABSENCE OF A BREACH OF CONTRACT.

After appellee vigorously argues that appellant breached and frustrated the contract he advances as a complete refutation of everything appellant contends the statement "all of the issues arising out of the contract were properly before the Court without reference to the question whether either party had breached the contract." Such a statement by the appellee in view of this pleadings and his brief is somewhat surprising. It was appellee who labelled this action one for breach of contract. A scan of his complaint reveals an almost complete predication of the action on breach as allegedly committed by the appellant. Appellant wishes to reiterate his position; that is, that the contract was not operative. Appellee brought up this question of breach. It is not for him now to make a denial of this issue. His statement "the entire contract was before the court" does not cure any of the difficulties that the appellee encounters on this point.

The appellant most definitely does not dispute the contract. What he does do is point to the conditions of the contract and say that since they went unfulfilled there was no breach and therefore no cause of action.

Appellee may say all he wants about the entire contract being in dispute, but he cannot thereby escape the applicable law. That is: when the conditions of a contract sale are unperformed there is no liability on either side to consummate the sale. There being no liability, there can be no breach, and there being no breach there can be no suit under the contract. *Tatum v. Ackerman*, 83 P. 151, 153, 148 C. 357.

Therefore, the appellee had to prove a breach as well as performance of conditions to recover on the contract.

III. THE COURT IMPROPERLY REFUSED DISMISSAL ON GROUNDS OF PREMATURETY.

Appellee has utilized several pages to indicate that the conditions precedent to performance of the contract or any suit thereon had been met in that (a) there was a joint audit, and (b) there was a proper reconciliation.

Appellant has previously shown in his opening brief why a joint audit did not occur. As to the purported reconciliation by Mr. Wiseman, appellee seems to have misread appellant's opening brief. Appellant reiterates and agrees with the contentions set out on page 13 "We should like to call the Court's attention to Mr. Wiseman's testimony at page 178 of the record where he testified that he was directed by the parties not to go back to the books of the corporation but to limit himself to reconciling the differences in the two audits." This clearly was Mr. Wiseman's duty. How

can it be said, when Mr. Viray's audit was \$79,601.91 and Mr. Kaneshiro's audit was \$121,228.67, that the final result of \$155,625.95, was a reconciliation? It is submitted that under no circumstances can this be called "a reconciliation", by any ordinary usage of such term. Accordingly, there was no meeting of conditions precedent and the action should have been dismissed.

IV. APPELLANT'S ANSWER TO APPELLEE'S CONTENTIONS ON FINDINGS.

The foregoing emphasized the fact that the questions of performance of conditions in breach are of the essence of the appellee's suit. Therefore, findings thereon are essential to the validity of the trial Court's judgment for the appellee.

Kweskin v. Finkelstein, 223 F. 2d 677;

Maher v. Henrickson, 188 F. 2d 700;

Irish v. United States, 225 F. 2d 3.

The appellee suggests that the findings of the trial Court are sufficient. But, it is so only if the heart of appellee's complaint is cut out and the essentials of the contract, suit and judgment are disregarded.

The appellant himself shows the impelling need for those findings. First he sues for breach. Then he says breach need not be proved. If the appellee cannot glean from the record on what the judgment should be properly predicated, he cannot say that the rule of waiver of minor defects in *Hurwitz v. Hurwitz*,

136 F. 2d 196, is applicable. If the record be not clear to him, it cannot be clear to anyone else. Therefore the rule in *Shapiro v. Boleas*, 166 F. 2d 655, 667, must apply and the failure to make such findings constitutes reversible error.

V. APPELLANT'S ANSWER TO APPELLEE'S ARGUMENT ON COSTS.

The appellee has made his position hereon untenable: that is, that the appellee was the prevailing party. Appellee has said that breach need not have been shown. The trial Court made no finding on legal duty thereby eliminating from the judgment the idea of breach.

This automatically takes the appellee out of the definition he quotes from *Loeb v. Moten*, 100 P. 2d 937, and proves that appellant was not the cause of the necessity of having the Court determine the actual value of the shares and awarding costs as damages against appellant. If there was any issue before the trial Court, it was there by reason of the contract provisions for reconciliation of differences by the Court, and under such circumstances each party must bear his own costs.

CONCLUSION.

For the reasons above stated it is respectfully submitted that judgment appealed from should be reversed.

Dated, San Francisco, California,
November 19, 1956.

Respectfully submitted,
E. R. CRAIN,
THOMAS M. JENKINS,
Attorneys for Appellant.



No. 15082

United States
Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,
vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-11-56

MAY 24 1956



No. 15082

United States
Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,

Appellant,

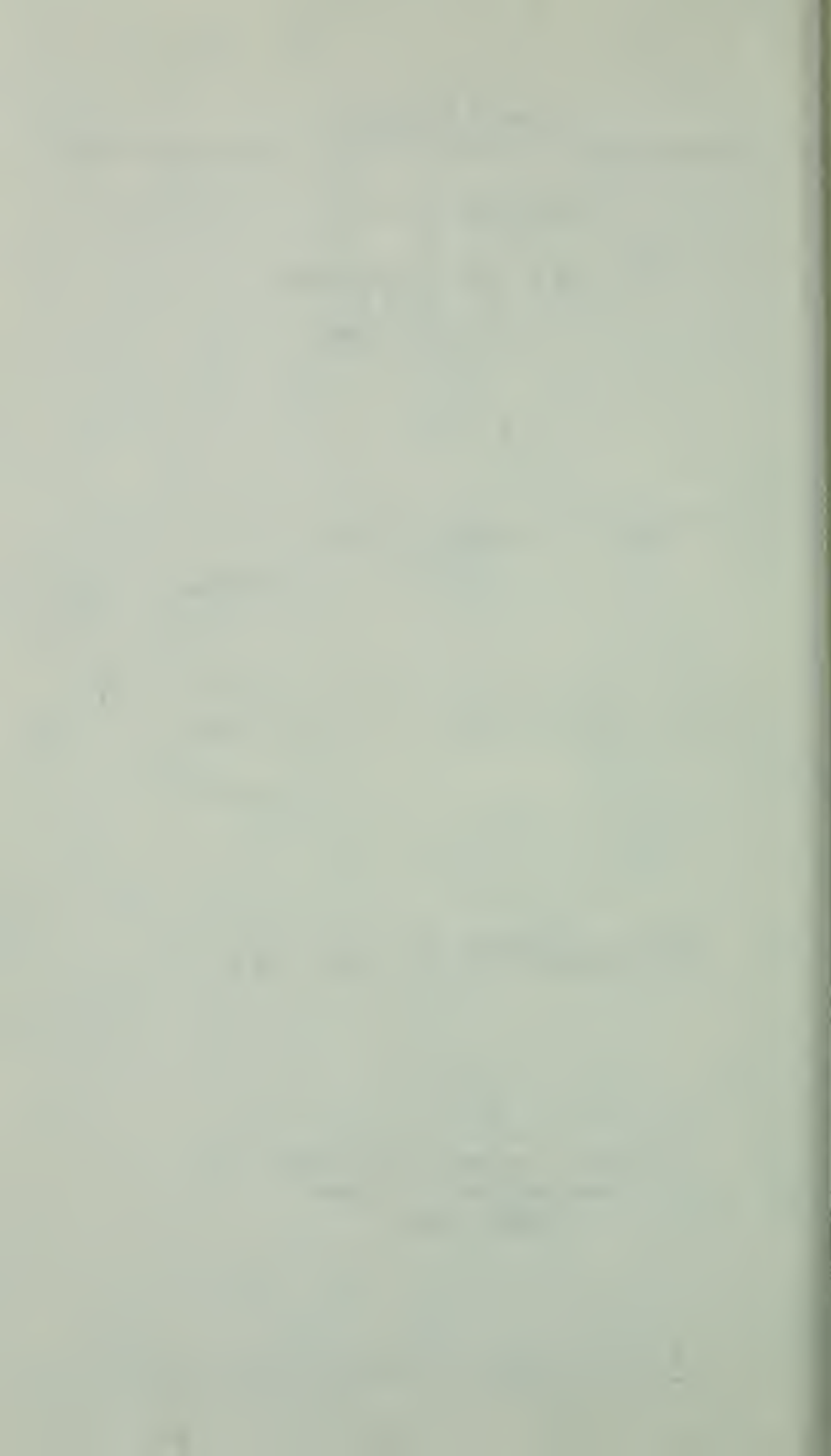
vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the Territory of Alaska,
Third Division

No. A7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Cor-
poration,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Defendant.

COMPLAINT

Plaintiffs Richardson Vista Corporation and
Panoramic View Corporation allege:

I.

That at all times herein mentioned plaintiffs were
and now are corporations duly organized and exist-
ing under the laws of the State of Washington; that
they have paid their annual Alaska corporation
license fee or tax last due and have filed their an-
nual reports for the last fiscal year and have fully
complied with the laws of the Territory of Alaska
relating to corporations of their classification.

II.

That the defendant, City of Anchorage, is a mu-
nicipal corporation organized and existing pursuant
to and by virtue of the laws of the Territory of
Alaska.

III.

That plaintiff Richardson Vista Corporation is the owner of a housing project located on Government Hill, Anchorage, Alaska, comprising nineteen (19) separate buildings, each of which consists of twenty-two (22) units; that plaintiff Panoramic View Corporation is the owner of a housing project adjacent to plaintiff Richardson Vista Corporation's housing project, located on Government Hill, Anchorage, Alaska, comprising fourteen (14) separate buildings, eight (8) of which consist of twenty-two (22) units, four (4) of which have sixteen (16) units, and two (2) of which consist of twelve (12) units. That plaintiff Richardson Vista Corporation's buildings are located on approximately twenty-three (23) acres of land leased by plaintiff Richardson Vista Corporation from the United States Army; that plaintiff Panoramic View Corporation's project is located on approximately seventeen (17) acres of land leased by said plaintiff from the United States Government Department of the Interior; that both of said tracts are unsubdivided and located within the City of Anchorage; that the streets and ways within both of said projects are the property of plaintiffs and have not been dedicated to the use of the public generally.

IV.

That plaintiff Richardson Vista Corporation's real property interests and plaintiff Panoramic View Corporation's real property interests, for tax purposes, are treated by the City of Anchorage as

two (2) units, one belonging to the first named plaintiff and the second belonging to the second named plaintiff.

V.

That both of plaintiffs' projects are commercial establishments and are managed by a single business entity, namely, Anchorage Rental Service, a partnership, and uniformly used for apartment dwellings under uniform leases with common maintenance and supervision.

VI.

'That all of both the plaintiffs' buildings were completed and occupied during the summer of 1951; that plaintiffs' buildings were erected pursuant to regulations of the Federal Housing Administration and plaintiffs' loans, made in connection with the construction thereof, were insured by said agency; that plaintiffs' buildings are widely separated in order to provide light, air and lawns around the apartment units, and to avoid a mechanical uniform outlook; that plaintiffs, in financing their projects, each entered into a single mortgage as to their separate interests covering the entire plat and real estate upon which all of each plaintiffs' buildings are located.

VII.

That plaintiffs are each furnished electricity by defendant and were billed as follows for the months of August, September, October, November and December, 1951, by defendant for electricity consumed by plaintiffs in connection with their buildings for

hall and garage lighting, exterior lighting, laundry and drying room lighting, current supplied to dryers, washing machines, pumps and steam conversion equipment, (But not for plaintiffs' tenants' electric consumption, which is the responsibility of the tenants, and for which they are individually billed and metered.):

(a) Richardson Vista—(Buildings No. 1 through No. 19):

1951	Consumption	Amount as Billed	Correct Billing per Plaintiffs' Theory	Diff.
August (9 bldgs.)	10,052	\$ 546.82	\$ 437.08	\$ 109.74
September (19 bldgs.)	51,486	2,692.83	2,094.44	598.39
October (19 bldgs.)	40,478	2,277.57	1,654.12	623.45
November (19 bldgs.)	47,560	2,502.93	1,937.40	565.53
December (19 bldgs.)	42,836	2,382.30	1,748.44	633.86
Total Overcharge				\$2,530.97

(b) Panoramic View—(Buildings No. 20 through 33):

1951	Consumption	Amount as Billed	Correct Billing per Plaintiffs' Theory	Diff.
August (no bldgs.)	—	—	—	—
September (4 bldgs.)	7,614	\$ 429.87	\$ 339.56	\$ 90.31
October (11 bldgs.)	18,724	1,083.05	783.96	299.09
November (14 bldgs.)	33,524	1,832.38	1,375.96	456.42
December (14 bldgs.)	30,488	1,697.47	1,134.52	562.95
Total Overcharge				\$1,408.77
Grand Total				\$3,939.74

VIII.

That in accordance with the electrical code of defendant City of Anchorage, plaintiffs were required to wire each building so that each of the tenants therein would be separately metered and so

that a meter in each building would be installed to measure the consumption described in the preceding paragraph of this complaint, or Paragraph VII; that meters as aforescribed were installed and are presently installed as afore described in all the plaintiffs' buildings.

IX.

That the rates of defendant City of Anchorage presently in force and governing electric consumption of customers of the City of Anchorage are set forth in their entirety in the attached Exhibit "A," which is hereby incorporated in this complaint as if set out in full herein and made a part hereof.

X.

That each of plaintiffs were separately billed monthly through their agent, Anchorage Rental Service, for each of the thirty-three (33) buildings contained in both projects, as completed and occupied and as shown in Paragraph VII, *supra*; that Schedule "C" or the commercial rate was applied to each of plaintiff Richardson Vista Corporation's buildings and to each of plaintiff Panoramic View Corporation's buildings by defendant City of Anchorage, considering each building as a separate customer for the months of August, September, October, November and December, 1951; that each of plaintiffs are a single customer of the City of Anchorage and entitled to the application of Schedule "C" to their total consumption for the purposes described in Paragraph VII *supra*, instead of treat-

ing each of plaintiffs' buildings as a separate customer.

XI.

That the total monthly electrical consumption and billing under the terms of defendant's Schedule "C," for the purposes described in Paragraph VII *supra*, of all of plaintiffs' buildings as completed and occupied is shown in the tabulation in Paragraph VII *supra*, for each of the months herein mentioned.

XII.

That by virtue of defendants' erroneous and incorrect application of its commercial rate to plaintiffs' consumption of electrical energy, each of plaintiffs have paid for electrical energy in an amount grossly in excess of what plaintiffs should rightfully pay had defendant's commercial rates been properly applied to plaintiffs' consumption, namely, \$2530.97, in the case of plaintiff Richardson Vista Corporation and \$1408.77, in the case of plaintiff Panoramic View Corporation; that defendant, in the application of its electrical rate to plaintiffs, has acted arbitrarily, unjustly, unequally, unreasonably, discriminatorily, non-uniformly and confiscatorily to its unjust enrichment and will continue said practice unless restrained.

XIII.

That other electrical consumers and customers of defendant similarly situated in the City of Anchorage are given the benefit of but one application of Schedule "C" to their entire consumption identical

with plaintiffs' consumption as described in Paragraph VII, particularly large apartment buildings located on similar unsubdivided contiguous tracts; that plaintiffs' projects are like one apartment consisting of many units in separate buildings; that at the time plaintiffs' projects were being designed, plaintiffs were informed by defendant that they would be granted a "wholesale" rate on that portion of electrical consumption used by them for the purposes described in Paragraph VII.

XIV.

That plaintiffs protested to defendant's governing board, namely, its City Council, the aforedescribed application of its rates to plaintiffs, and requested that the rate be properly applied; that at their appearance before the City Council, plaintiffs brought all of the matters herein mentioned to the attention of said body and fully and completely stated its grounds for protest; that this request was denied on November 9, 1951, by the City Council of defendant; that plaintiffs have exhausted all of their administrative remedies with regard to their complaint against defendant.

XV.

That all of the payments made by plaintiffs to defendant in connection with the furnishing of electrical energy as described in Paragraph VII hereof have been made; that all payments were paid under protest and the checks therefor clearly so marked with reference made to an accompanying letter of

protest, which accompanied each of said payments and gave the reasons therefor. That no portion of said payments has been repaid to plaintiffs or to anyone for or on their account; that the payments so made under protest were made by plaintiffs involuntarily and solely to avoid the threatened imposition of statutory penalties and the discontinuance of plaintiffs' electrical services and other utility services by the defendant for non-payment of its electrical utility charges in accordance with the ordinances of the City of Anchorage, as contained particularly in Section 603, Article 6, Chapter III, Anchorage General Code, passed and approved April 12, 1950; that defendant has continued its erroneous and discriminatory billing since November 9, 1951, and threatens and indicates that it will continue said billing; that by reason of the foregoing, plaintiffs have no plain, speedy, adequate nor proper remedy at law to recover back their payments so paid under protest.

Wherefore plaintiffs pray:

(a) That defendant City, its agents, officers and employees, be enjoined from charging each of plaintiffs defendant's commercial electrical rate or tariff in the manner aforescribed and ordered to apply the commercial rate to each of plaintiffs total consumption, and be ordered to desist from charging each of plaintiffs' buildings as if they were separate consumers of defendant.

(b) That defendant City, its agents, officers and employees, be ordered and directed to repay to

plaintiff Richardson Vista Corporation the sum of \$2530.97, together with interest at the rate of six per cent (6%) per annum from date of each respective protest until so repaid, and similarly the amount of \$1408.77 to plaintiff Panoramic View Corporation.

(c) For costs and disbursements herein incurred, together with a reasonable attorneys' fee in the amount of \$.....

(d) For such other and further relief as the Court deems just and equitable.

HELLENTHAL,

HELLENTHAL & COTTIS,

By /s/ RALPH H. COTTIS,

Of Attorneys for Plaintiffs.

Duly verified.

EXHIBIT "A"

City of Anchorage, Alaska,
Electric Light and Power Service

Permits must be obtained for all electrical work.

Application for electric energy will be received at the City Clerk's Office, City Hall, between 8 a.m. and 3 p.m. daily, except Saturdays, Sundays and Holidays. A removal charge will be made on meters not retained six months.

Light and Power Tariff

Schedule (D) Domestic Rate:

This schedule is applicable to single phase service furnished for lighting, cooking, small appliances and for incidental single phase motors not in excess of five (5) horsepower, in private, single family residences and in separately metered single family apartments.

First 15 KWHrs	10c
Next 50 KWHrs	7c
Next 100 KWHrs	5½c
Excess KWHrs	4½c
Minimum monthly charge per meter.....	\$1.50

Schedule (C) Commercial Rate:

This service applicable to single phase service for lighting, cooking, small appliances and incidental single phase motors not in excess of five (5) horsepower, in professional, mercantile, industrial and other establishments not classed as single family residences.

First 25 KWHrs	10c
Next 50 KWHrs	8c
Next 50 KWHrs	7c
Next 1000 KWHrs	6c
Next 1000 KWHrs	5c
Excess KWHrs	4c
Minimum monthly charge per meter.....	\$1.00

Schedule (B) Commercial Baking—Off Peak Load:

This schedule applicable for baking only in commercial bakeries where the customer's installation includes heavy duty bake ovens. The period of operation is from 1 a.m. to 6 a.m. These ovens shall not be operated at any other time.

Rate per KWHrs 2c

Minimum monthly charge\$5.00

Schedule (P) Commercial Power Rate:

This schedule is applicable to service for motors and other power devices not specifically covered by other schedules. No service shall be furnished under this schedule for generators supplying energy direct to lighting circuits.

Rate per KWHrs 5c

Minimum monthly charge per horsepower.\$1.00

Maximum on minimum charge.....\$5.00

Schedule (WD) Controlled Water Heating Service:

This schedule is applicable only to separately metered 230-volt circuit. Service furnished during limited service hours, for electric storage type water heating equipment in single family dwellings.

Per KWHrs027c

Minimum monthly charge per meter

\$3.50 for first 250 KW.

Schedule (WC):

This schedule is applicable only to separately metered 230-volt circuit. Service furnished during

limited hours only, for electric storage type water heating equipment in other than single family houses.

Rate per KWHrs027c
Minimum monthly charge per meter....	\$7.00

Rural Rates Schedule

Schedule (D) Domestic Rate:

First 15 KWHrs	11c
Next 50 KWHrs	8c
Next 100 KWHrs	6½c
Excess KWHrs	5½c
Minimum monthly charge per meter.....	\$1.50

Schedule (C) Commercial Rate:

First 25 KWHrs	11c
Next 50 KWHrs	9c
Next 50 KWHrs	8c
Next 1000 KWHrs	7c
Next 1000 KWHrs	6c
Excess KWHrs	5c

Schedule (WD) Controlled Water Heating Service —Domestic:

This schedule is applicable only to separately metered 230-volt circuit. Service furnished during limited service hours, for electric storage type water heating equipment in single family dwellings.

250 KWHrs or less per month	\$4.50
Excess KWHrs027

Schedule (WC) Controlled Water Heating Service
—Commercial:

500 KWHrs or less per month	\$8.50
Excess KWHrs027

Schedule (P) Power Rate—Commercial:

Per KWHrs	6c
Minimum charge per horsepower	\$1.00

Under schedule (WD) controlled water heating service, hot water tanks are equipped with an electric time clock, which disconnects the current between the hours of 4 p.m. and 7 p.m. daily.

[Endorsed]: Filed January 23, 1952.

[Title of District Court and Cause.]

ANSWER

Defendant, City of Anchorage, a municipal corporation, in answer to the plaintiffs and each of the plaintiff's complaint, admits, denies and alleges as follows:

I.

Defendant, not having sufficient information or belief upon which to base an answer to paragraph I of plaintiffs' complaint, denies each and every allegation contained therein.

II.

Defendant admits the allegations contained in paragraph II of plaintiffs' complaint.

III.

Defendant, not havong sufficient information or belief upon which to base an answer to paragraph III of plaintiffs' complaint, denies each and every allegation contained therein.

IV.

Defendant admits the allegations contained in paragraph IV of plaintiffs' complaint.

V.

Defendant, not having sufficient information or belief upon which to base an answer to paragraph V of plaintiffs' complaint, denies each and every allegation contained therein.

VI.

Defendant, not having sufficient information or belief upon which to base an answer to paragraph VI of plaintiffs' complaint, denies each and every allegation contained therein.

VII.

Defendant admits each and every allegation contained in paragraph VII of plaintiffs' complaint except it denies that the bills set out therein are correct. In connection with the foregoing denial, the defendant alleges that the correct billings for the plaintiffs for the months of August, September, October, November and December, 1951, were and are as set out in Schedule A as pertains to Richardson Vista Corporation and Schedule B as pertains to Panoramic View Corporation of this, the defend-

ant's answer, which Schedules A and B are by reference incorporated herein and made a part of this answer as if fully set out herein.

VIII.

Defendant admits the allegations contained in paragraph VIII of the plaintiffs' complaint.

IX.

Defendant admits the allegations contained in paragraph IX of the plaintiffs complaint.

X.

Defendant admits only so much of paragraph X of plaintiffs' complaint which alleges that each of the plaintiffs were separately billed monthly for each of the buildings contained in both projects, and that Schedule C, or commercial rates, were applied to each of plaintiffs' buildings, considering each building as a separate customer for the months of August to December, 1951, inclusive. Defendant denies each and every other allegation therein contained.

XI.

Defendant denies each and every allegation contained in paragraph XI of the plaintiffs' complaint and alleges that the total monthly electrical consumption and billing under Schedule C in Exhibit A of the plaintiffs' complaint is as set out in the defendant's Schedule A as applies to Richardson Vista Corporation and defendant's Schedule B as applies to Panoramic View Corporation for each

month shown in defendant's Schedules A and B respectively.

XII.

Defendant denies each and every allegation contained in paragraph XII of plaintiffs' complaint and alleges that the defendant has billed the plaintiffs and each of them properly for the months of August to December, 1951, inclusive, as shown in defendant's Schedules A and B heretofore referred to.

XIII.

Defendant denies each and every allegation contained in paragraph XIII of plaintiffs' complaint.

XIV.

Defendant admits only so much of paragraph XIV of the plaintiffs' complaint which reads, "That plaintiffs protested to defendant's governing board, namely, its City Council, the aforescribed application of its rates to plaintiffs." That defendant denies that its rates were improperly applied to the plaintiffs and defendant further alleges that the plaintiffs, nor either of them, had any valid basis for protesting the application of the defendant's electrical rates.

XV.

As to paragraph XV of the plaintiffs' complaint, the defendant denies that all payments have been made by the plaintiffs and each of them to the defendant in connection with the furnishing of electrical energy as described in paragraph VII of the plaintiffs' complaint, but admits payment by the

plaintiffs and each of them for billings of electrical energy as billed by the defendant as set out in Schedules A and B, respectively, of defendant's answer; defendant admits that all payments made to it by the plaintiffs for electrical energy and billed by the defendant were paid under protest and that no portions of said payments paid under protest have been repaid to plaintiffs for or on their account. Defendant, not having sufficient information or belief upon which to base an answer as to whether the payments made under protest by the plaintiffs were involuntary and solely to avoid the threatened imposition of statutory penalties and the discontinuance of plaintiffs' electrical services and other utility services by the defendant for non-payment of electrical utility charges, denies each and every allegation to that effect as set out in paragraph XV of plaintiffs' complaint. Defendant denies that it has erroneously and discriminatively billed plaintiffs, or either of them, for electrical energy either before or since November 9, 1951, and in this connection, alleges that its billings have been proper and reasonable. Defendant denies that the plaintiffs, or either of them, are entitled to recover back from the defendant any payments whatsoever made by the plaintiffs, or either of them, under protest.

Wherefore, defendant having answered plaintiffs, and each of the plaintiff's complaint, prays:

1. That the plaintiffs, or either of them, take nothing by this action, and that the complaint be dismissed.

2. That the defendant have and recover from and of the plaintiffs, and each of them, costs and disbursements herein incurred by the defendant, together with a reasonable attorneys' fee for defending same.

3. Defendant demands a jury trial.

4. For such other and further relief as the Court deems just and equitable.

KAY, ROBISON and MOODY,

By /s/ RALPH E. MOODY,

Of Attorneys for Defendant.

Duly verified.

Schedule A

City of Anchorage

Electrical Service to Richardson Vista

1951	Building No.	Consumption	Charge
August	1	1,008	\$ 62.98
	2	1,128	70.15
	3	978	61.18
	4	2,252	125.08
	5	824	51.94
	16	842	40.97
	17	888	43.04
	18	910	44.03
	19	986	47.45
September	1	2,550	137.00
	2	2,590	138.60
	3	2,488	134.52
	4	1,146	71.05
	5	2,298	126.92
	6	2,958	153.32

1951	Building No.	Consumption	Charge
September	7	2,888	\$ 150.52
	8	534	34.54
	9	3,160	161.40
	10	3,364	169.56
	11	3,634	150.36
	12	3,144	160.76
	13	3,024	155.96
	14	3,492	174.68
	15	3,924	191.96
	16	3,556	177.24
	17	2,358	129.32
	18	2,186	122.44
	19	2,192	122.68
October	1	1,334	80.45
	2	2,272	125.88
	3	2,182	122.28
	4	2,380	130.20
	5	1,852	106.35
	6	2,004	113.95
	7	1,870	107.25
	8	3,088	158.52
	9	2,228	124.12
	10	2,426	132.04
	11	2,556	161.24
	12	2,354	129.16
	13	2,276	126.04
	14	2,246	124.84
	15	2,408	131.32
	16	1,008	62.98
	17	2,014	114.45
	18	2,030	115.25
	19	1,950	111.25
November	1	3,056	157.24
	2	2,546	136.84
	3	2,488	134.52
	4	2,506	135.24
	5	2,326	128.04
	6	2,340	128.60
	7	2,182	122.28

1951	Building No.	Consumption	Charge
November	8	2,392	\$ 130.68
	9	2,550	137.00
	10	2,594	138.76
	11	2,664	141.56
	12	2,678	142.12
	13	2,386	130.44
	14	2,350	129.00
	15	2,554	137.16
	16	2,242	124.68
	17	2,334	128.36
	18	2,078	117.65
	19	2,294	126.76
December	1	2,302	127.08
	2	1,980	112.75
	3	2,534	136.36
	4	2,322	127.88
	5	1,986	113.05
	6	2,280	126.20
	7	1,840	105.75
	8	2,100	118.75
	9	2,098	122.92
	10	2,106	119.05
	11	2,582	138.28
	12	2,418	131.72
	13	3,256	165.24
	14	2,086	126.55
	15	2,436	132.44
	16	2,120	119.75
	17	2,182	122.28
	18	1,918	109.65
	19	2,290	126.60
1952			
January	1	1,596	93.55
	2	1,558	91.65
	3	2,300	127.00
	4	1,944	110.95
	5	1,640	95.75
	6	2,112	109.48
	7	1,500	88.75
	8	2,102	118.85

1951	Building No.	Consumption	Charge
January	9	1,992	\$ 118.35
	10	1,784	102.95
	11	4,656	211.24
	12	2,130	120.20
	13	828	52.18
	14	1,784	102.95
	15	2,028	115.15
	16	1,804	103.95
	17	1,736	110.55
	18	1,578	92.65
	19	1,908	109.15

Schedule B

City of Anchorage

Electrical Service to Panoramic View

1951	Building No.	Consumption	Charge
September	20	2,292	\$ 126.68
	21	2,526	136.04
	22	1,686	98.05
	23	1,110	69.10
October	20	1,722	100.00
	21	1,918	109.65
	22	1,648	94.15
	23	1,924	109.95
	24	1,916	109.55
	25	1,524	89.95
	26	1,166	72.05
	27	870	54.70
	31	2,062	116.85
	32	1,894	108.45
	33	2,080	117.75
November	20	2,526	136.04
	21	2,600	139.00
	22	2,422	131.88
	23	2,456	133.24
	24	2,656	141.24
	25	2,540	136.60

1951	Building No.	Consumption	Charge
November	26	2,670	\$ 141.80
	27	2,686	142.44
	28	2,376	130.04
	29	2,858	149.32
	30	2,488	134.52
	31	2,384	130.36
	32	1,442	85.85
	33	1,726	100.05
December	20	2,308	127.32
	21	2,152	121.08
	22	1,938	110.65
	23	2,246	124.84
	24	2,580	138.20
	25	2,360	129.40
	26	2,280	126.20
	27	2,368	129.72
	28	2,422	131.88
	29	2,042	115.85
	30	2,084	117.95
	31	2,352	129.08
	32	1,468	87.15
	33	1,888	108.15
1952			
January	20	1,744	100.95
	21	1,760	101.75
	22	1,602	78.85
	23	1,796	103.55
	24	2,990	127.30
	25	2,124	120.00
	26	1,668	96.15
	27	1,630	95.25
	28	1,824	104.95
	29	1,676	97.55
	30	1,426	85.05
	31	2,064	116.95
	32	1,408	84.15
	33	1,850	106.25

Service of copy acknowledged.

[Endorsed]: Filed February 13, 1952.

[Title of District Court and Cause.]

STIPULATION

The above parties by their respective attorneys stipulate that the complaint herein may be supplemented at any time to and including March 10, 1955.

Dated at Anchorage, Alaska, this 1st day of March, 1955.

HELLENTHAL,
HELLENTHAL & COTTIS,

By /s/ RALPH H. COTTIS,
Attorneys for the Plaintiffs.

/s/ JOHN L. RADER,
Attorney for the Defendants.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Plaintiff Richardson Vista Corporation supplements complaint heretofore filed in the above-entitled action as follows:

1. That the following new paragraph be added to Paragraph VII(a) of said complaint:

That during the calendar years 1952, 1953 and 1954, plaintiff Richardson Vista Corporation was billed monthly as if each of plaintiffs' nineteen

buildings were a separate customer of defendant. That during the period from August 1, 1951, through December, 1954, plaintiff Richardson Vista Corporation was overcharged \$20,590.66; that defendant since December, 1954, has continued to overcharge said plaintiff and threatens to continue such overcharges, all to plaintiff's damage in the estimated amount of \$400 per month.

2. That Paragraph X of plaintiffs' Richardson Vista Corporation's complaint be supplemented by adding the following sentence thereto:

That plaintiff Richardson Vista Corporation's nineteen buildings were considered as nineteen customers of defendant during the calendar years 1952, 1953 and 1954, and continue to be so considered.

3. That Paragraph XII of plaintiff Richardson Vista Corporation's complaint be supplemented by striking the amount "\$2,530.97" in line 5 of said paragraph and substituting therefor "\$20,590.66, plus \$400 per month for each month subsequent to December, 1954."

4. That plaintiff Richardson Vista Corporation's said complaint be supplemented in Paragraph (b) of the prayer for relief contained therein by striking the amount "\$2,530.97" contained in the third line thereof and substituting therefor "\$20,590.66, plus \$400 per month for each month subsequent to December, 1954."

Dated at Anchorage, Alaska, this 1st day of March, 1955.

HELLENTHAL,

HELLENTHAL & COTTIS,

By /s/ JOHN S. HELLENTHAL,

Attorneys for the Plaintiffs.

[Endorsed]: Filed March 1, 1955.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE

MARCH 18, 1955

Now at this time this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time pre-trial conference in cause No. A-7481, entitled Richardson Vista Corporation, a Washington corporation, and Panoramic View Corporation, a Washington corporation. Plaintiffs, versus City of Anchorage, a municipal corporation. Defendant, came on regularly before the Court. Richardson Vista Corporation represented by John Hellenthal and Ralph Cottis, of its counsel. Panoramic View Corporation represented by F. M. Reischling, of Seattle, Washington, and Albert Maffei, its counsel. City of Anchorage represented by John Radar, its counsel. The following proceedings were had, to wit:

Statement to the Court was had by John Radar, counsel for defendant.

Statement to the Court was had by John Hellen-thal, of counsel for Richardson Vista Corporation.

Statement to the Court was had by F. M. Reischling, of counsel for Panoramic View Corporation.

Statement to the Court was had by John Radar, of counsel for City of Anchorage.

There being no issues to simplify, amendments to pleadings, admissions of fact, or any other matter concerning which the respective counsel could stipulate, the conference was adjourned.

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Plaintiff, Panoramic View Corporation, supplements complaint heretofore filed in the above-entitled action as follows:

1. That the following new paragraph be added following Paragraph VII(a) of said complaint.

(b) Panoramic View—(Buildings #20-33, inc.)

That during the calendar years of 1952, 1953, 1954 and 1955, plaintiff, Panoramic View Corporation, was billed monthly as if each of plaintiff's fourteen (14) buildings were separate customers of defendant. That during the period from September 1, 1951, through February, 1955, plaintiff, Pano-

ramic View Corporation, was billed for 861784 kilowatt hours as follows: 1951 (September-December) 90656; 1952—261352; 1953—248210; 1954—222826; 1955, January-February—38740; that defendant city billed Panoramic View Corporation for said total kilowatt hours in the total sum of \$49,737.12; that during the said entire period of time and for the total number of kilowatt hours hereinabove set forth Panoramic View Corporation was overcharged for said electrical power so consumed not less than \$14,436.27; that the total sum billed to and paid by Panoramic View Corporation for the power consumed as above set forth totaled \$49,737.12, which said sum is the total of the monthly bills tendered to and paid by Panoramic View Corporation under continuing protest to the City of Anchorage; plaintiff, Panoramic View Corporation, does not know the basis and/or rate schedule upon which the bills for power consumed by Panoramic View Corporation were determined by the City of Anchorage and alleges on information and belief, that in figuring and determining the amount due to the City for said power consumed, the City used an erroneous rate and/or did not give to plaintiff, Panoramic View Corporation, the most favorable rate to which it was entitled by reason of the quantity of power used and the similarity of service as rendered to other consumers of power; that in computing and billing Panoramic View Corporation the defendant City failed to take into account the fact that Panoramic View Corporation is a single customer and as such entitled to a rate figured upon the total quan-

tity of power consumed; that the defendant City is continuing to overcharge plaintiff, Panoramic View Corporation, and threatens to and will continue to so overcharge Panoramic View Corporation for power consumed in an amount and at a rate unknown to plaintiff, Panoramic View Corporation, but which plaintiff contends and alleges will not be less than 20 per cent more than it should be billed if the proper and most favorable rate to which Panoramic View Corporation is entitled was applied.

2. That Paragraph X of the plaintiffs', Panoramic View Corporation, complaint be supplemented by adding the following sentence thereto:

That plaintiff, Panoramic View Corporation's fourteen buildings were considered as fourteen individual customers of defendant during the calendar years of 1952, 1953, 1954 and 1955 and continues to be so considered; that in addition thereto the defendant City makes a separate and additional charge for the office of Panoramic View Corporation thereby constituting the Panoramic View Corporation company manager's office as an additional separate owner customer; that all of the power consumed by said office, together with all power consumed in said fourteen buildings, should be billed to Panoramic View Corporation as one single customer giving to Panoramic View Corporation the benefit of the declining rate in accordance with the amount of power consumed by said corporation.

3. That Paragraph XII of plaintiff, Panoramic View Corporation's, complaint be supplemented by striking the amount "\$1408.77" in line 6 of said paragraph and substituting in lieu thereof the sum of "\$14,436.27, subject to proper arithmetical computations on proper rates) per month for each month subsequent to December, 1954 * * *"

4. That plaintiff Panoramic View Corporation's said complaint be supplemented in Paragraph (b) of the prayer for relief contained therein by striking the amount "\$1,408.77" contained in the fifth line thereof and substituting therefor \$14,436.27, plus \$200.00 per month for each month subsequent to December, 1954."

Dated at Anchorage, Alaska, this 22nd day of March, 1955.

F. M. REISCHLING and
ALBERT MAFFEI,

Attorneys for Plaintiff, Panoramic View Corporation.

By /s/ F. M. REISCHLING,

By /s/ ALBERT MAFFEI.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

STIPULATION

Pre-trial conference having met on Friday, March 18, 1955, at 2 o'clock p.m., but having adjourned because of the inability of the defendant to participate therein by reason of the fact that its attorney was absent from Anchorage until the day before, and it being stipulated thereupon in open Court that the matters and things to be determined at said pre-trial conference be taken up subsequent thereto and settled by stipulation between the parties in the absence of the Court, said stipulation to be presented to the Court for the purpose of limiting issues at the trial of the above-entitled cause, and the parties having met by respective counsel and having stipulated to said matters contained in the pleadings in said cause,

Now, Therefore, it is hereby stipulated and agreed as follows:

I.

That Paragraphs I, II, IV, VII(a), VII(b) and XI (except for possible errors in arithmetical computations) of plaintiffs' complaint as supplemented by plaintiffs, be and the same hereby are admitted by the defendant and no evidence shall be introduced in support of the allegations in said paragraphs.

II.

That Paragraph III of plaintiffs' complaint be and the same is hereby admitted excepting that it

is understood and agreed that the last clause in said paragraph, commencing with the words "that the streets" and ending with the words "public generally" being the last two and one-quarter lines of said paragraph shall be deemed to be amended as follows:

"That since the inception of Panoramic View Corporation's and Richardson Vista Corporation's projects, the defendant by agreement with plaintiffs has asserted full jurisdiction over the streets and ways located in both projects; that formal dedication of said streets and ways in the case of Panoramic View Corporation's project was made in recent months; that formal dedication of the streets and ways in Richardson Vista Corporation's project is delayed pending approval by the military, though dedication in fact has been accomplished."

III.

That Paragraph V of plaintiffs' complaint shall be deemed to be amended to read as follows:

"That each of plaintiffs' projects is commercial establishments and uniformly used for apartment dwelling under uniform leases pursuant to FHA regulations which govern each project."

That defendant's answer to said paragraph shall be amended to admit the allegations therein and that no proof shall be necessary in aid of said allegation.

IV.

That Paragraph VIII shall be deemed to be amended by the insertion of the word "claimed" before the word "accordance" in line 1 thereof.

V.

That Paragraph IX be stricken and the following be substituted therefor:

"That at all times mentioned in plaintiffs' complaint and until July 1, 1954, the full complete rate schedule of defendant, promulgated, published and in effect, governing electric consumption of customers of the defendant, together with the conditions limiting and governing the furnishing of service is set forth in the attached Exhibit A; that on July 1, 1954, Exhibit A was amended by the attached Exhibit B; that on January 1, 1955, a new comprehensive and complete rate was promulgated, published and made effective by defendant, together with the terms and conditions of service, which is marked Exhibit C, all of which exhibits are incorporated herein as if set out in full in this complaint."

VI.

That Paragraph X as supplemented by each of plaintiffs is admitted except that for the words "Schedule 'C'" in line 10 thereof, there shall be substituted the following:

"the most favorable rate, which defendant contends is Schedule 'C,' as amended July 1, 1954, by Exhibit B."

VII.

That in Paragraph XII of plaintiffs' complaint, the words "commercial" in lines 2 and 4 be stricken and the words "most favorable" be substituted in each instance in lieu thereof, otherwise said paragraph is denied.

VIII.

That in line 3 of Paragraph XIII, the words "or the most favorable rate" be added thereto following the words "Schedule 'C,'" otherwise said paragraph is denied.

IX.

It is stipulated that all payments made by plaintiffs have been made under continuing protest, otherwise Paragraph XV is denied.

X.

No stipulations are made as to Paragraphs VI and XIV of plaintiffs' complaint.

XI.

That plaintiffs' prayer for relief as changed by supplemental complaints filed herein is further changed by substituting in the fourth line thereof the words "most favorable" for the word "commercial."

Dated at Anchorage, Alaska, this 22nd day of March, 1955.

HELLENTHAL,

HELLENTHAL & COTTIS,

Attorneys for Plaintiffs, Richardson Vista Corporation and Panoramic View Corporation,

By /s/ JOHN S. HELLENTHAL,

F. M. REISCHLING and
ALBERT MAFFEI,

Attorneys for Plaintiff, Pano-
ramic View Corporation,

By /s/ F. M. REISCHLING.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

NOTICE OF DEMAND TO PRODUCE

To the Defendant, City of Anchorage, and to John
Rader, Its Attorney:

You Are Hereby Given Notice that at the trial of
the above-entitled cause on Thursday, March 24,
1955, you are requested to produce the following
documents:

1. Original copies of City of Anchorage electri-
cal rate schedules in effect since January 1, 1951, to
date, including but not being limited to

- (a) Schedule in effect during 1951
- (b) Schedule in effect February, 1953
- (c) Schedule in effect July 1, 1954
- (d) Schedule in effect January 1, 1955
- (e) Schedule in effect February 10, 1955

together with the dates on which each of the above
schedules became effective.

2. All published rules and regulations pertaining to the furnishing of electrical energy by the City of Anchorage to its electrical customers, if any, other than those included in the tariffs referred to in Paragraph I above, in effect since January 1, 1951.

3. A letter addressed to Mayor, Members of the City Council, City Manager, City of Anchorage in re, "Electric power rates and meter deposits—Panoramic View and Richardson Vista projects," signed Anchorage Rental Service by Lela M. Hall, agent for Panoramic View and Richardson Vista projects, personally delivered to addressee on or about November 7, 1951, and which letter requested decision in connection with the problems therein presented be made at City Council meeting of November 9, 1951, together with copy of wire attached.

4. A copy of letter addressed by William H. McKinley, superintendent, electrical department, to National Fire Protection Association, 60 Battery March, Boston 10, Massachusetts, said letter being dated July 17, 1954, together with reply or replies thereto and additional correspondence, if any, in connection therewith.

5. Utilities payment bond furnished by Anchorage Rental Service as agent for Richardson Vista Corporation and the Panoramic View Corporation as principal to the City of Anchorage and dated approximately January, 1952, together with such additional surety bonds as may have thereafter been filed with the City of Anchorage pursuant to the requirement of said City by each of plaintiffs.

6. Minutes of council meeting of November 9, 1951, together with tape recording of proceedings.

7. Original of CAA contract No. C8ca-3782 with City of Anchorage dated April 6, 1951, together with all attached exhibits and changes thereto, plus any other contracts entered into by the City of Anchorage for sale of electric energy.

Dated at Anchorage, Alaska, this 23rd day of March, 1955.

HELLENTHAL, HELLEN-
THAL & COTTIS,

Attorneys for Plaintiffs, Richardson Vista Corpora-
tion and Panoramic View Corporation,

By /s/ JOHN S. HELLENTHAL.

F. M. REISCHLING and
ALBERT MAFFEI,

Attorneys for Plaintiff, Pan-
oramic View Corporation,

By /s/ F. M. REISCHLING.

Service of copy acknowledged.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

TRIAL BY COURT—MARCH 24, 1955

Now at this time, this cause coming on to be
heard before the Honorable George W. Folta, Dis-

trict Judge, the following proceedings were had, to wit:

Now at this time cause No. A-7481, entitled Richardson Vista Corporation, a Washington Corporation and Panoramic View Corporation, a Washington Corporation, plaintiffs, versus City of Anchorage, a municipal corporation, defendants, came on regularly for trial. Plaintiff Richardson Vista Corporation represented by John S. Hellenthal and Ralph H. Cottis of their counsel.

Plaintiff Panoramic View Corporation represented by F. M. Reischling and Albert Maffei of their counsel.

Defendant City of Anchorage represented by John Radar, City Attorney, the following proceedings were had, to wit:

John Hellenthal of counsel for plaintiff Richardson Vista moves the Court for a Pre-Trial conference.

Motion granted and at 10:30 o'clock a.m. Pre-Trial Conference commenced.

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE—MARCH 24, 1955

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time cause No. A-7481, entitled

Richardson Vista Corporation, a Washington Corporation, and Panoramic View Corporation, a Washington Corporation, plaintiffs versus City of Anchorage, a municipal corporation, defendant, came on for Pre-Trial Conference. Came the respective parties and their respective counsel as heretofore, and the following proceedings were had, to wit:

John Radar, City Attorney for defendant City of Anchorage, moves Court for Jury Trial.

Argument on motion by John Hellenthal of counsel for plaintiff Richardson Vista Corporation.

Motion denied.

Electrical billing to Anchorage Rental Service for Panoramic View—house meters, duly offered marked and admitted defendants Exhibit A.

Electrical billing to Anchorage Rental Service for Richardson Vista—house meters duly offered marked and admitted defendants Exhibit B.

City of Anchorage, Alaska electric light and power service rates effective date January 1, 1951, duly offered marked and admitted defendants Exhibit C.

City of Anchorage, Alaska, electric light and power service rates published April, 1953, duly offered marked and admitted defendants Exhibit D.

City of Anchorage, Alaska, electric light and power service rates effective date July 1, 1954, duly offered marked and admitted defendants Exhibit E.

City of Anchorage, Alaska, electric light and power service rates effective date January 2, 1955,

duly offered marked and admitted defendants Exhibit F.

City of Anchorage, Alaska, electric light and power service rates effective date February 10, 1955, duly offered marked and admitted defendants Exhibit G.

Diagram of Richardson Vista and Panoramic View duly offered marked and admitted defendants Exhibit H.

At 11:50 o'clock a.m. Court continued Pre-Trial Conference to 2:00 o'clock p.m.

2:00 P.M.

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time came the respective parties and their respective counsel as heretofore and Pre-Trial Conference in cause No. A-7481, entitled Richardson Vista Corporation, a Washington Corporation and Panoramic View Corporation, a Washington Corporation, plaintiffs versus City of Anchorage, a municipal corporation, was continued. The following proceedings were had, to wit:

John Hellenthal counsel for plaintiff Richardson Vista moves court to amend complaint by adding the word claimed before accordance.

Motion granted.

John Hellenthal of counsel for plaintiff Richardson Vista, moves the Court to amend complaint.

Motion granted.

John Hellenthal of counsel for plaintiff Richardson Vista moves the Court to amend prayer of complaint by changing the word Commercial to most favorable.

Motion granted.

City of Anchorage Ordinance No. 55 duly offered marked and admitted defendants Exhibit I.

Letter from Anchorage Rental Service to City of Anchorage duly offered marked and admitted plaintiffs Exhibit #I.

National Electrical Code dated 1953 duly offered marked and admitted defendants Exhibit J.

At 3:00 o'clock p.m. Court continued cause to 3:12 o'clock p.m.

3:12 P.M.

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now at this time came the respective parties and their respective counsel as heretofore and Pre-Trial Conference in cause No. A-7481, entitled Richardson Vista Corporation, a Washington Corporation, and Panoramic View Corporation, a Washington Corporation, plaintiffs, versus City of Anchorage, a municipal corporation, was continued. The following proceedings were had, to wit:

Copy of minutes of a special meeting of the city counsel held on November 9, 1951 at 8:00 o'clock

p.m. duly offered marked and admitted defendants Exhibit #K.

Invitation, Bid and Award (Supply Contract) issued by Civil Aeronautics Administration together with a map of real estate data, Anchorage International Airport, duly offered marked and admitted defendants Exhibit L.

At this time (3:45 p.m.) on inquiry of Court, parties reported no further matters for consideration at Pre-Trial Conference.

Thereupon Court directed that Trial by Court be resumed.

[Title of District Court and Cause.]

TRIAL BY COURT—MARCH 28, 1955

Now at this time this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now came the respective parties and their respective counsel as heretofore and the trial of cause No. A-7481, entitled, Richardson Vista Corporation, a Washington corporation and Panoramic View Corporation, a Washington corporation, plaintiffs, versus City of Anchorage, a municipal corporation, defendant, was resumed.

Plaintiffs rest.

John Radar, City Attorney for the defendant City of Anchorage, moves the Court to dismiss the plaintiffs complaint.

Argument on motion by John Radar, City Attorney for the defendant City of Anchorage.

At 3:05 o'clock p.m. Court continued cause to 3:15 o'clock p.m.

3:15 P.M.

Now at this time, this cause coming on to be heard before the Honorable George W. Folta, District Judge, the following proceedings were had, to wit:

Now came the respective parties and their respective counsel as heretofore and the trial of cause No. A-7481, entitled Richardson Vista Corporation, a Washington corporation and Panoramic View Corporation, a Washington corporation, versus City of Anchorage, a municipal corporation, defendant, was resumed.

Argument on motion to dismiss by F. M. Reischling, counsel for plaintiff Panoramic View.

Argument on motion to dismiss by Ralph Cottis of counsel for plaintiff Richardson Vista.

Argument on motion to dismiss by John Radar, attorney for defendant City of Anchorage.

Motion denied.

George W. Nichols, being first duly sworn testified for and in behalf of the defendant.

At 5:00 o'clock p.m. Court continued cause to 10:00 o'clock a.m. of Tuesday, March 29, 1955.

[Title of District Court and Cause.]

OPINION

Plaintiffs, owners of housing projects comprising 19 and 14 apartment buildings respectively, on two unsubdivided tracts within the City of Anchorage, seek to recover approximately \$40,000 in alleged overpayments for electricity supplied for such facilities and places in each building as are used exclusively by the plaintiffs or provided for the use of their tenants in common, and measured by a meter in each building. In the application of rates and in billing for the current consumed, the City treated each building as if it were separately owned. The plaintiffs contend that each housing project should be treated as a single customer, the meter readings combined, and the rate applicable to the total energy used, applied. The City contends that the installation and maintenance of a separate service drop and meter at each building warrant the classification made and points to the fact that all identical housing projects, as well as more than 200 multi-meter consumers within its corporate limits, are similarly dealt with.

Manifestly, if the City's position is untenable, the recovery of overcharges by all these consumers might well have disastrous consequences. The trial, which was to the Court, was somewhat protracted and marked by vehemence and indigation, affected or genuine, and the briefs, aggregating 135 pages, are of like tenor, but as I view the case, out of the

welter of contentions only two questions emerge, (1) whether a housing project consisting of several buildings erected on one tract of land and owned by one person is an "establishment" within the meaning of Schedule (C) of the City's rate tariffs, and (2) if so, whether the practice of the City in refusing to combine meter readings is in conflict with the schedule.

It appears that before these housing projects had been completed in 1951, the plaintiffs discussed the matter of rates with some of the officials of the City with the view of obtaining the benefit of conjunctive billing. Apparently all the parties thought ordinance No. 55 was still in effect. It provided that "in no event would separate premises, even though owned by the same consumer, be supplied with electricity through the same meter or meters" and expressly prohibited combined meter readings "except where the City, for its own convenience, installed more than one meter." The sections containing these provisions had, however, been repealed on August 24, 1949, by ordinance No. 283, without a reenactment of these provisions. Sec. 602.1 of that ordinance empowers the City Manager to make and publish rates and charges for electrical energy and service, and Sec. 608.1 provided that

"The City Manager, with the approval of the City Council, may adopt and promulgate such rules and regulations as may be necessary pertaining to the supplying and discontinuance of electric service to all consumers, including but

not being limited to rates, charges for connecting and disconnecting service, separate meters for separate premises* * *”

Effective January 1, 1951, the City promulgated rate tariffs, the following schedule of which is applicable to this controversy:

Schedule (C) Commercial Rate

This service applicable to single phase service for lighting, cooking, small appliances and incidental single phase motors not in excess of five (5) horsepower, in professional, mercantile, industrial and other establishments not classed as single family residences.

First 25 KWHrs.....	10c
Next 50 KWHrs	8c
Next 50 KWHrs.....	7c
Next 1000 KWHrs.....	6c
Next 1000 KWHrs.....	5c
Excess KWHrs	4c

It was in this setting that the plaintiffs presented their demand for conjunctive billing to the City Council. Although it may be inferred from the testimony that the repeal of the provisions of ordinance No. 55 was inadvertent and that the City Council and officials were ignorant thereof, the reason stated in the minutes of the meeting of the City Council of November 9, 1951, defendant's Exhibit K, at which the plaintiffs' demand was denied, that to grant the demand "would alter the established policy of billing for each individual building and would also

affect many others who own more than one building and are billed on a separate unit basis” would appear to indicate knowledge of the repeal. Thereafter the plaintiffs paid their bills under protest, according to Schedule (C), which survived successive revisions until the sweeping revision of January 2, 1955.

It is conceded that after ordinance No. 283 became effective no rule or regulation was adopted prohibiting conjunctive billing and plaintiffs argue that in the absence of such a rule or regulation the practice referred to was unauthorized because of Sec. 49-1-3 of the Code governing public utilities generally. I am of the opinion, however, that the language of that section clearly shows that it was not intended to apply to municipalities.

Since it can hardly be disputed that the plaintiffs' housing projects are “establishments” within the meaning of Schedule (C), the crucial questions are (1) whether the refusal of the City Council to grant the request for combining meter readings is equivalent to an authorization or ratification of the practice referred to, and, (2) if so, whether the practice conflicts with Schedule (C). Since the language of Sec. 602.1 of ordinance No. 283 is merely permissive and the Court has already held that Sec. 49-1-3 of the Code does not apply, it follows that the City was not required to make such a practice the subject of a rule or regulation. However, Schedule (C) necessarily implies that an “establishment” is entitled to the benefits of the sliding scale of rates, whereas the

construction placed upon this schedule by the City is that such an "establishment" is entitled to this benefit only if the service is of the 1-point variety. While this classification could hardly be said to be unreasonable, and therefore invalid, yet, since it effectually excluded any establishment consisting of more than one building from the benefits of lower rates for increased consumption, I am of the opinion that it was in conflict with Schedule (C) except where multiple meters were installed at the request of the consumer.

Judgment may be presented in accordance herewith.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 25, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter came on for trial before the Honorable George W. Folta, District Judge, without a jury, at Anchorage, Alaska, on March 24, 1955. The trial continued through March 29, 1955. Plaintiff Richardson Vista Corporation was present by its attorneys John S. Hellenthal and Ralph H. Cottis; plaintiff Panoramic View Corporation was represented by its attorneys John S. Hellenthal, Ralph H.

Cottis and F. M. Reischling, the latter having associated Albert Maffei with himself. The defendant was present by its attorney John L. Rader. A pre-trial conference having been held to narrow the issues, testimony was adduced on behalf of all parties, exhibits introduced, briefs filed and the matter having been taken under advisement, the Court now makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiffs are Washington corporations and have fully complied with the laws of Alaska relating to corporations of their classification.

2. Defendant is a municipal corporation existing under the laws of Alaska.

3. Each of plaintiffs owns several apartment buildings within the City of Anchorage located on similar unsubdivided contiguous tracts, each of which buildings contains several apartments.

4. Defendant has supplied and is supplying electricity to plaintiffs' apartment house establishments commercially. During the period from initial occupancy of the establishments to the time of trial, defendant applied its rate schedules for electricity consumed by each of plaintiffs as if the separate buildings within each establishment were a separate customer. This method of charging plaintiffs resulted in higher bills and payments than would have been the case if the charges were made with one application of the rate to each establishment each month.

5. During such period, the defendant had in effect rate schedules of which Schedule "C" applied to commercial establishments such as plaintiffs. Defendant had no applicable rules or regulations in effect other than those set forth in Schedule "C."

6. All payments by plaintiffs were made under protest.

7. Each of plaintiffs' apartment buildings had its own set of meters; one of said meters was used to measure consumption of house current within the building; and the other meters were used for measuring consumption of current by the tenants in each apartment; said tenants have been billed directly by defendant. The method of delivering electricity to each apartment house with separate meters for the apartments and a separate meter for the "house" was the most feasible method by which the City could connect its distribution system to the various buildings within each establishment.

8. Plaintiffs protested the application of the electrical rates promptly to the governing body of the defendant, namely, its city council, and have exhausted all administrative remedies with respect thereto.

9. No portion of the amounts paid by plaintiffs for electricity consumed for "house" purposes has been repaid to them.

10. Defendant had threatened and indicated that the defendant would continue to treat each building in each establishment as a separate customer.

From the foregoing facts, the Court concludes the law to be as follows:

Conclusions of Law

1. The apartment buildings within each of plaintiffs' projects constituted commercial establishments within the meaning of the applicable rate schedule promulgated by defendant.

2. Each of plaintiffs was entitled to one application of the schedule in computing the charges to be paid defendant for current consumed by the "house."

3. Defendant's failure to make one application of the rate schedule to each establishment was unlawful.

4. Plaintiffs are entitled to recover the difference between the amounts paid by them and the amounts which should have been paid had the rate schedule been applied once to each establishment; together with interest from the date of each overpayment computed at six per cent per annum, its costs, and attorneys' fees in the amount of

5. Plaintiffs are entitled to an injunction restraining defendant from applying its rate schedule separate to each building within each establishment; and to an order requiring defendant to repay plaintiffs the amounts of overcharges as computed in accordance with the foregoing, together with costs and attorneys' fees.

6. Plaintiffs have no adequate remedy at law.

Dated at Anchorage, Alaska, this 27th day of May, 1955.

Respectfully submitted,

HELLENTHAL, HELLEN-
THAL & COTTIS,

Attorneys for Plaintiffs Richardson Vista Corpora-
tion and Panoramic View Corporation,

By /s/ RALPH H. COTTIS.

.....,
District Judge.

Receipt of copy acknowledged.

[Endorsed] Filed May 27, 1955.

[Title of District Court and Cause.]

HEARING ON OBJECTIONS TO FINDINGS
OF FACT AND CONCLUSIONS OF LAW
AND JUDGMENT—JUNE 17, 1955

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge the following proceedings were had, to wit:

Now at this time hearing on objections to Findings of Fact and Conclusions of Law and Judgment in cause No. A-7481, entitled Richardson Vista Corporation, a Washington corporation, and Panoramic

View Corporation, a Washington Corporation, Plaintiffs, versus City of Anchorage, a municipal corporation, Defendant, came on regularly before the Court, John S. Hellenthal and Ralph H. Cottis, appearing for plaintiff Richardson Vista Corporation; Albert Maffei and F. M. Reischling appearing for plaintiff Panoramic View Corporation, and John Rader, for defendant. The following proceedings were had, to wit:

Argument to the Court was had by F. M. Reischling, for and in behalf of the plaintiff Panoramic View Corporation.

Argument to the Court was had by John Rader, for and in behalf of the defendant.

Argument to the Court was had by Ralph H. Cottis, for and in behalf of the plaintiff Richardson Vista Corporation.

Whereupon the Court having heard the arguments of respective counsel and being fully and duly advised in the premises requests respective counsel to confer and attempt an agreement as to form of decree.

In the District Court for the Territory of Alaska,
Third Division

No. A-7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Cor-
poration,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Defendant.

JUDGMENT AND DECREE

This matter having been brought on regularly for hearing this 17th day of June, 1955, before the undersigned judge of the above-entitled Court on the motion of the plaintiff, Panoramic View Corporation for judgment, plaintiff appearing by its counsel, F. M. Reischling of Seattle and Albert Maffei of Anchorage, Alaska; Plaintiff, Richardson Vista, also appearing and presenting its motion for judgment by attorneys, John S. Hellenthal and Ralph H. Cottis; the defendant, City of Anchorage, appearing by John L. Rader, City attorney; the matter having been argued and submitted to this Court and the Court having jurisdiction of said matter, and it appearing to the Court that the above-entitled cause was brought on regularly for trial before the Honorable George W. Folta, District Judge, without a jury, at Anchorage, Alaska, on

March 24, 1955, said trial continuing through March 29, 1955; that the parties were represented at said trial by counsel hereinabove named and it further appearing to the Court that witnesses were sworn, testimony adduced by said parties, exhibits introduced and that plaintiff, Panoramic View Corporation filed briefs in support of its position and in answer to the defendant's brief, and the Court having taken the matter under advisement, and having on May 25, 1955, signed and filed a written opinion and decision holding for plaintiffs, copies of which opinion were mailed to respective counsel for the parties by the office of said District Judge, and it further appearing to the Court that the Honorable George W. Folta died thereafter and before entering a formal judgment in accordance with his filed opinion, and it further appearing to this Court that in his filed opinion the trial Court found that the defendant City in its application of its published rates for consumption of electrical power by its customers deprived and denied to plaintiff the benefits of the published schedule and treated plaintiff, Panoramic View's apartment project, consisting of fourteen buildings, as though it were fourteen separate and distinct owner customers, notwithstanding the fact that the said fourteen buildings were erected on one tract of land, owned by one person, and operated as a single business, and that defendant's act of refusing to combine the electric meter readings of the said fourteen buildings is in conflict with the defendant City's published Schedule "C," which provides in effect that "estab-

lishments'' are entitled to the benefit of a declining rate based upon increasing consumption; and the trial Court having further found that plaintiff, Panoramic View's apartment housing project is an "establishment" within the meaning of defendant **City's published and applicable rate Schedule "C"** and the trial Court having further found that the plaintiff had paid under protest to the City, its light bills which did not conform to the published schedule and the amounts of which were in excess of the amount that the defendant City could have properly charged under said published rate Schedule "C" and the trial Court having concluded from said Findings of Fact that plaintiff is entitled to judgment as prayed for, and it therefore appearing to this Court that the entry of a formal judgment on the findings of the trial Court as contained in his opinion and decision is the exercise of a proper ministerial power under the circumstances, Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Panoramic View Corporation, do have and recover judgment against the defendant City for the difference between the amount which it has paid to defendant for electric power and the amount which should have been paid to defendant, had defendant's promulgated and published rate schedule been properly applied to plaintiff Panoramic View's apartment establishment, and it is further

Ordered, Adjudged and Decreed that defendant pay to Panoramic View Corporation interest at the

legal rate from date of each overpayment upon the amount of such overpayment. and it is further

Ordered, Adjudged and Decreed that defendant be, and it hereby is, restrained and enjoined from applying any rate schedule to plaintiff Panoramic View's establishment not based upon a proper, reasonable, and substantial classification and in accordance with a promulgated and published schedule of rates, and it is further

Ordered, Adjudged and Decreed that plaintiff shall have judgment for its costs and disbursements herein to be taxed, together with attorney's fees in the sum of \$480.00.

Done in Open Court this 21st day of June, 1955.

/s/ J. L. McCARREY, Jr.,
District Judge.

Presented by:

/s/ ALBERT MAFFEI,
Of Counsel for Panoramic
View Corporation.

Due and timely service of copy of plaintiff Panoramic View's original proposed judgment and decree admitted this 16th day of June, 1955.

/s/ JOHN L. RADER,
Counsel for Defendant.

/s/ JOHN S. HELLENTHAL,
Counsel for Plaintiff,
Richardson Vista.

[Words “and Plaintiff Panoramic View Corporation” added again by John S. Hellenthal (after being ruled out by F. M. Reischling) at the request of Court, June 21, 1955.]

/s/ J. S. HELLENTHAL.

[Endorsed]: Filed and entered June 21, 1955.

In the United States District Court for the District
of Alaska, Division Number Three at Anchorage

No. A-7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Corporation,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corporation,

Defendant.

DECREE

This Matter came on for trial before the Honorable George W. Folta, District Judge, without a jury, at Anchorage, Alaska, on March 24, 1955. The trial continued through March 29, 1955. Plaintiffs were represented by attorneys John S. Hellenthal and Ralph H. Cottis of the firm of Hellenthal, Hellenthal & Cottis, of Anchorage, Alaska, and plaintiff Panoramic View Corporation by F. M. Reisch-

ling of Seattle, Washington, and Albert Maffei of Anchorage, Alaska. Defendant was present by its attorneys, John L. Rader. A pre-trial conference was held to narrow the issues; testimony was adduced on behalf of the parties; exhibits were introduced; briefs were filed; the matter was taken under advisement; a written opinion was filed by the trial judge, the Honorable George W. Folta, on May 25, 1955, wherein the findings of fact and conclusions of law are evident and definitive; proposed findings of fact and conclusions of law, submitted by plaintiffs and incorporating the findings and conclusions inherent in the opinion, were not acted upon because of the untimely death of the Honorable George W. Folta. It appearing to the undersigned judge, regularly sitting in the Court in which the action was tried, that the written opinion of May 25, 1955, sufficiently establishes the findings of fact and conclusions of law of the Court,

Now Therefore, on motion of Hellenthal, Hellenthal & Cottis, it is

Ordered, Adjudged and Decreed that defendant pay to plaintiff Richardson Vista Corporation the difference between the amount heretofore paid by plaintiff Richardson Vista Corporation to defendant and the amounts which should have been paid by plaintiff Richardson Vista Corporation had defendant's rate schedule been applied once to its establishment and it is further

Ordered, Adjudged and Decreed that defendant pay to plaintiff Richardson Vista Corporation inter-

est from the date of each overpayment computed at six per cent per annum upon the amount of such overpayment and it is further

Ordered, Adjudged and Decreed that defendant be, and it hereby is, restrained from applying its rate schedules separately to each building within the establishment owned by plaintiff Richardson Vista Corporation unless such practice be sanctioned by duly promulgated and legally sufficient ordinance or regulation and it is further

Ordered, Adjudged and Decreed that defendant pay to plaintiff Richardson Vista Corporation its costs as taxed by the Clerk of this Court and a sum to apply upon its attorneys' fees in the amount of \$720.00.

Dated at Anchorage, Alaska, this 21st day of June, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed and Entered June 21, 1955.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes Now the City of Anchorage, defendant herein, by and through its attorney, John L. Rader, and moves the Court for a new trial of the above-entitled matter for the following reasons:

1. Defendant was deprived of its right to a trial by jury of all issues so triable.

2. The judgment of the Court is contrary to the law.

3. The judgment of the Court is contrary to the evidence.

4. The judgment of the Court is contrary to the weight of evidence.

5. There is no sufficient or substantial evidence tending to support the Opinion, Judgment and Decree entered herein.

6. The judgment of the Court and the Memorandum Opinion, upon which said judgment is predicated, does not find sufficient facts nor contain sufficient conclusions of law.

7. The Decree and Judgments as entered herein do not conform to the Memorandum Opinion and the Findings of Fact and Conclusions of Law stated in the same.

8. The Decree and Judgment as entered and the Memorandum Opinion are not definite enough to dispose of the issues in controversy between the parties in this cause.

9. The Court erred in denying defendant's motion to direct a verdict in its favor at the close of plaintiffs' case.

10. The Memorandum Opinion and the Decree and Judgment entered thereon are not sufficiently

clear and definite to apply the doctrines of estoppel and res judicata to future cases and controversies.

11. The Memorandum Opinion filed by the Honorable George W. Folta, deceased, is not sufficient in findings of fact and conclusions of law to enter a decree on the same.

Dated at Anchorage, Alaska, the 30th day of June, 1955.

/s/ JOHN L. RADER,

Attorney for the City of Anchorage, Defendant
Herein.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

ORDER

This matter of defendant's motion for a new trial having been brought on regularly for hearing this 26th day of August, 1955, before the undersigned judge of the above-entitled Court; plaintiff, Richardson Vista appearing by it's counsel of record, Hellenthal, Hellenthal and Cottis; Panoramic View Corporation appearing by it's counsel of record F. M. Reischling and Albert Maffei; the defendant, City of Anchorage, appearing by it's counsel of record, John L. Rader. The matter having been

fully argued to the Court and the briefs having been submitted and the defendant, City of Anchorage, having submitted without argument Section 2 through 11 inclusive of its motion and the Court being of the opinion that said motion is not well taken and that said motion for new trial should be denied, Now Therefore,

It Is Hereby Ordered, Adjudged and Decreed that defendant, City's motion for a new trial be and the same is hereby denied.

/s/ J. L. McCARREY, JR.,
Judge of District Court.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed August 31, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant, City of Anchorage, a municipal corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgments and decrees entered in this matter on or about the 21st day of June, 1955, and also the order of the Court denying defendant's motion for new trial on or about August 26, 1955.

Appellant hereby gives notice of appeal of all orders relative to the foregoing entered on behalf of either one or both of plaintiff corporations.

Dated at Anchorage, Alaska, the 6th day of September, 1955.

/s/ JOHN L. RADER,
Attorney for Appellant,
City of Anchorage.

Receipt of Copy Acknowledged.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

ORDER GRANTING EXTENSION OF TIME
IN WHICH TO DOCKET AND FILE THE
RECORD ON APPEAL

This matter having come on regularly for hearing on the 14th day of October, 1955, and the plaintiffs appearing through their counsel, Hellenthal, Hellenthal & Cottis and Albert Maffei, and the defendant appearing through its counsel, John L. Rader, and the Court having considered the motion of defendant for an extension of time in which to file and docket the record on appeal, and no objection having been made by plaintiffs or either of them,

Now, therefore, it is hereby ordered that the time for docketing the record on appeal is hereby extended to the 6th day of December, 1955.

Dated at Anchorage, Alaska, the 14th day of October, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of Copy Acknowledged.

[Endorsed]: Filed and Entered October 14, 1955.

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION OF
ATTORNEYS

Comes now John L. Rader, Attorney for the City of Anchorage, and moves the Court for an order substituting Lynn W. Kirkland as City Attorney and as attorney in this cause. This motion is based upon the fact that the undersigned has resigned as attorney for the City of Anchorage and Lynn W. Kirkland has been appointed City Attorney by the City Council.

Dated at Anchorage, Alaska, the 28th day of November, 1955.

/s/ JOHN L. RADER,
Attorney for the
City of Anchorage.

ORDER SUBSTITUTING ATTORNEYS

This matter having come on for hearing upon the motion of John L. Rader and the Court being fully advised in the premises,

It Is Ordered that the substitution above moved for be, and the same is, hereby made.

Dated at Anchorage, Alaska, the 2nd day of December, 1955.

/s/ J. L. McCARREY, JR.,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered December 2, 1955.

In the District Court for the District of Alaska,
Third Division
No. A-7481

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Cor-
poration,

Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Defendant.

Before: The Honorable George W. Folta, U. S. Dis-
trict Judge.

PROCEEDINGS

March 18, 1955—2:00 P.M.

Appearances:

For the Plaintiffs, Richardson Vista Corporation and Panoramic View Corporation:

JOHN S. HELLENTHAL,

RALPH H. COTTIS,

Attorneys at Law.

For the Plaintiff, Panoramic View Corporation:

F. M. REISCHLING,

Attorney at Law.

ALBERT MAFFEI,

Attorney at Law.

For the Defendant:

JOHN L. RADER,

City Attorney.

The Court: Well, have the counsel conferred among themselves to see if they can agree on the disposition of some of the issues?

Mr. Rader: If it please the Court, I did talk to Mr. Reischling yesterday. I want it to appear in the record I arrived back from San Francisco Wednesday night and Mr. Reischling and I had tentatively agreed among ourselves we would get together Monday and attempt to work out our differences in billing and that type of thing. I also called

Mr. Hellenthal about it in the hope that we could do the same thing at that time. I had understood until this morning that the pre-trial conference would be next Tuesday and consequently I am very ill prepared at this moment to make the stipulations that I think can be made in this case.

The Court: The Court is not going to be here Tuesday. That is why it was changed to today.

Mr. Rader: I don't doubt but what there was good reason for changing it, but in a matter of the few hours it makes it difficult if not impossible for me. I am not trying to delay nor am I trying to be obstinate. It is just the fact I am ignorant.

The Court: Why didn't you disclose your ignorance to my secretary this morning?

Mr. Rader: If the Court please, I had rather disclose my ignorance to you than to your secretary.

The Court: I thought you might have on account of your [5*] recent return and perhaps lack of opportunity and I asked her when I got back in the office whether you had objected to it or indicated you were unprepared and she said no. Otherwise, we wouldn't be here if you had.

Mr. Rader: Well, it is my understanding that the plaintiffs have some differences among themselves. I didn't wish to stand in their way. I don't know if they have any differences themselves to settle or not, but if they do there is no reason for them not having a pre-trial conference. It doesn't necessarily have to be a 3-way pre-trial conference.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

The Court: There is not much purpose served in having a pre-trial conference limited to the plaintiffs without having everybody here.

Mr. Hellenthal: I can assure Your Honor there is no need for a pre-trial conference, as counsel suggests, among the plaintiffs.

Mr. Rader: That is fine then.

Mr. Hellenthal: I don't quite understand what he is talking about.

The Court: You mean there is no great difficulties between you?

Mr. Hellenthal: None that I know of.

The Court: That is, between the plaintiffs?

Mr. Hellenthal: Yes.

The Court: If that is the situation I don't know why we [6] should tarry any longer here.

Mr. Rader: If it please the Court, what is the arrangement now going to be as to the tentative trial date on this case? I understand the plaintiffs have witnesses they wish to bring up from the States and it may be that I will also.

The Court: I went up on a wild-goose chase to Fairbanks. They never notified me that the case on trial was in progress or would not be concluded for another couple of days until after I got up there, so that requires my return to Fairbanks Monday morning and it means that everything on the calendar will have to be postponed about 3 days.

Mr. Rader: Would that mean we would reasonably expect this case to go to trial a week from Monday?

The Court: What is next Monday?

Mr. Rader: A week from Monday would be the 28th. That would be a 3-day delay.

The Court: Without the calendar I don't know if this is the next case on the calendar.

Mr. Hellenthal: Your Honor, this case is set for trial on the 23rd.

The Court: I know that. There is no use of reminding me of that. What is the next case is all I am interested in now.

Mr. Hellenthal: As I told Your Honor this morning on the telephone we have witnesses now that expect to arrive Monday. They anticipate being here Monday for a pre-trial conference [7] Tuesday and the trial on Wednesday. According to our discussion this morning the trial would be held on Thursday or 24 hours one way or the other from 10:00 o'clock Thursday morning and we, of course, have to adjust our schedules and bring these witnesses up here so I would like to urge that when the date is established that it be at an early date because my people have to adjust their schedules accordingly, some may come from New York, and that you try to set it as soon as possible so that we won't waste too much time and money in connection with it, although I realize there are other considerations.

The Court: I don't think I am able to answer the question that I myself have raised as to when this case is set for trial. If it is the next case that is set for trial on the calendar it will come up in the regular course of business, I presume 10:00 o'clock Thursday morning. It could possibly be

earlier than that, but it wouldn't be more than 12 or 24 hours earlier and it could conceivably be later, but without having my calendar I can't tell you. I assume that this case is the next case set for trial.

Mr. Cottis: Could we get your calendar for you, Your Honor?

The Court: Well, I think probably all we need to do is you might call my secretary and ask her if this case is the next case on the calendar for trial.

Mr. Cottis: If the Court please, do I understand because [8] of the City's admitted ignorance we are not going ahead with the pre-trial conference; we are not going to try to limit the issues at this time?

The Court: Well, it would have to be a one-sided thing.

Mr. Cottis: You just don't think you can do it?

Mr. Rader: If it please the Court, there is one thing that is pretty important that I think we can agree on now which will save substantial time in the preparation of this matter and that is that the plaintiffs allege a certain rate schedule was applied erroneously by the City of Anchorage. Now, the plaintiffs have amended their complaint to bring the time down from 1952 to the present date. I think that they have failed to take into consideration rate changes since that time and rate regulations which are different than those as alleged in their pleadings. However, if we do go into that I think we are going to be trying about four different cases that will all be a little bit different and I don't believe that on any of them they need litigation after we establish probably the one basic fact. On the orig-

inal complaint and the regulations that existed as of that time, which we have admitted, if we have to bring it down to date through regulation changes and rate changes it will be rather difficult. Now, unless I am mistaken I think that the plaintiffs, and I think I am prepared, at least I'd like to sound you out on this, to try the case on the basis of the original regulations and the original rates. The difference will be, as I understand it, on whether or [9] not you should have 1 meter or 30 meters. If it is established in that case that you should have 1 meter then it is a matter, I believe, of probably mathematical computation to bring it down to date, but if they have anything else in mind besides that, why, then I would have to in my answer deny the regulations and bring in a lot of others which would really complicate the case.

Mr. Cottis: I think the whole essence of the thing is whether each of the plaintiffs is a single customer or whether they are as many customers as each of them owns buildings, and that certainly is the issue. The rest of it is arithmetic.

Mr. Rader: I believe it is, but I didn't know for sure that was your feeling also.

The Court: If that is the case I suppose that a pre-trial conference would in no event accomplish anything since, if that is what you call the basic fact, I hardly suspect that you could agree on it.

Mr. Rader: I think that that fact, if we can eliminate all the other factors and there are a good many additional facts alleged, I believe, frankly,

before trial time I will be able to agree with counsel on practically all of these side issues that we have and if it will remain with just that one basic issue I believe, but at this time I am unable to state that. Frankly, I just haven't had a chance to check all the side issues.

The Court: That appears to be just a question of construing the ordinance. [10]

Mr. Rader: Actually, I don't believe it is. It will be a question of commonlaw application, I believe, as applied to utility regulations. There may be a statutory problem involved in the thing too.

The Court: Well, will it require adducing evidence?

Mr. Rader: I believe it will, yes, Your Honor. There is a charge that we treat this establishment and these consumers, these plaintiffs, different than other similarly situated consumers. I assume that they intend to produce evidence that there is discrimination there. They also charge that the City made representations to them that they would receive certain preferential treatment which we have denied and I assume that they will produce evidence on that. I assume that they may also produce evidence by expert witnesses as to whether or not the classification made by the City is reasonable and is one customarily made in utility regulations and rate findings. By the same token I assume we will probably produce our own expert witnesses as to that point, but I believe that will be about the essence of the case. If counsel has any other ideas I would appreciate hearing it, but that is the way I view the case.

Mr. Reischling: If the Court please, it was my idea that this pre-trial conference would be held to limiting the issues to the pleadings of the case and, of course, that counsel would stipulate to the truth of certain of plaintiffs allegations so that we would not have to go forward with evidence to prove [11] things that had been admitted by this pre-trial conference and I am in accord generally, I believe, with what counsel has said. It is our purpose to limit the issues. There may be some matters in which evidence may be introduced that we will offer, but I see no reason why, if we cannot have a pre-trial conference today, that we could not by agreement perhaps stipulate to certain things so we can limit the issues as of the time that the trial commences so that the time consumed in the trying of the case can be reduced to the extent that they have agreed upon, matters that have been contained in the pleadings.

The Court: Well, you can stipulate all you want, and, of course, you should do that if you can agree on any of these matters, but at least you wouldn't require the Court to take any action on those other than to recognize the stipulation, which the Court will do unless you attempt to stipulate on matters of law. Then it will probably be reached about the 28th.

Mr. Cottis: The 28th, a week from Monday.

The Court: No, I mentioned next Thursday. I don't know. I haven't got the calendar here.

Mr. Hellenthal: Can I go get the calendar?

The Court: Then, will it go approximately to the 24th; it wouldn't be far off from that?

Mr. Hellenthal: And Your Honor, we will go, as I understand Your Honor to state this morning that in case we do get started Thursday, which appears to be a likelihood that we will, [12] that we estimate the case will take about 2 days, that Your Honor will be willing to hold a Saturday morning session if necessary?

The Court: Well, what is the reason for that?

Mr. Hellenthal: For the reason that I stated this morning, that I have these witnesses coming from out of town and I hesitate to keep them all during the week end if it can be avoided.

Mr. Rader: If it please the Court, because of the fact we have so many out of town people coming on this thing, unless it would too seriously inconvenience the Court, I know it would be greatly to my convenience to have it start Monday morning at a time certain and continue until concluded. That would be a week from Monday. It is of enough importance that our witnesses from the States and our expert testimony will be expensive and which will of necessity have to be employed from the States that we not be jeopardized too closely and have it drag out over a week end which it is almost certain to do, it appears to me, if we don't start until Thursday or maybe Friday.

The Court: Well, I have had my calendar disarranged too many times now on account of this Fairbanks case that it has resulted in great inconvenience to litigants as well as to the Court and I

don't feel like putting any case over beyond the date that has been finally set for trial.

Mr. Rader: Well, that was my reason. This is the time we are finally setting it for trial and I thought that this would be a proper time to request that change. [13]

The Court: Well, but that doesn't take into consideration the fact that I have several days in which I have been called on to further disrupt or disarrange the calendar in order to get some case started next Thursday which may run beyond next Monday.

Mr. Reischling: If the Court please, for the record I too want to resist any further continuation on the ground that I missed a motion made for a continuance of this case and it was set for the 23rd of this month. I have a case I am supposed to be in Seattle to try on the 30th, and I had one that I had to try on the 22nd or rather Tuesday of this week, therefore, if the Court will start the case at the earliest possible moment that will, of course, be in accord with the setting which the Court has heretofore given to this case and which will much more suit my convenience.

The Court: I have just indicated that is what the Court would do. I suppose there is nothing further then to call to the attention of the Court at this time. If not, it should be understood that the case will start on the 28th with the possibility that it may be one day later—I mean the 24th. If there is nothing further we will adjourn this Court until Thursday morning.

(Thereupon, at 2:23 o'clock p.m., Court was adjourned to Thursday, March 24, 1955, at the hour of 10:00 o'clock a.m.) [14]

The Court: I assume the parties are ready for trial this morning.

Mr. Rader: Ready, Your Honor.

The Court: You may make your opening statement.

Mr. Hellenthal: Your Honor, we should like to request at this time that in order to simplify the facts to be presented that we hold a pre-trial conference which I think should take not more than 20 minutes to a half hour and which should save perhaps a half a day of testimony.

The Court: I thought you were engaged in doing that the last several days.

Mr. Hellenthal: Your Honor, you will recall that originally the pre-trial conference in this matter was scheduled on the 22nd of March, then the pre-trial conference instead was scheduled for 2:00 o'clock on the 18th of March when Your Honor returned from Fairbanks after his first recent trip there and at that time the City, defendant, announced that they were not prepared to participate in the conference because counsel had just returned from traveling outside. The parties thereupon stipulated that they would endeavor Monday, which was the earliest date that the City would be prepared, to meet and enter into a stipulation to accomplish these purposes. A meeting was held on Monday, this last Monday of this week, and a stipula-

tion was prepared, but yesterday the City was unable to sign the stipulation for reasons [16] of its own, however, there are many factors that can be stipulated to. I think 95 per cent of the matters contained in the integrated stipulation which was signed by counsel for plaintiffs and which is a matter of the files—it was filed yesterday, I believe—and using that as a basis I think we can accomplish great things with this pre-trial conference.

The Court: Well, what do you propose as a means of accomplishing—elimination of issues here or narrowing of issues or do you mean what is already set forth in the proposed stipulation?

Mr. Hellenthal: Your Honor, I would suggest that the Complaint, Supplemental Complaint and Answer be used as a guide and that we follow the normal method. For instance, take paragraph 1 of the Complaint—I know that the City right now will agree to admit the facts in that paragraph and if we follow that method, which was the sensible method followed in the stipulation, I think we can eliminate a great many factual issues.

The Court: You may propose what things you think should be agreed to here and we will see what the defendant has to say about them.

Mr. Rader: If it please the Court, the defendant has endorsed on the answer a demand for a jury trial. I think my own objection might be governed somewhat as to what the Court's ruling on that is.

The Court: Well, was it in time?

Mr. Rader: Yes, it was endorsed on the answer, [17] your Honor. I think the rule is within

10 days of the last pleading. So far as that is concerned we can request a jury trial at this moment if it had never been requested before because of the amended complaint.

The Court: No, you can't get a jury trial merely by amending pleadings.

Mr. Rader: I don't need to rely on that. It is endorsed on the original answer. Actually it is contained in paragraph 3 of defendant's prayer.

The Court: Well, apparently that has been overlooked. I don't suppose we have any jurors in attendance.

Mr. Rader: Well, it certainly wasn't overlooked by the parties. It has been discussed between myself and the plaintiffs.

The Court: It apparently has been overlooked by the Court. I don't know whether there is any jury——

The Bailiff: The jury is excused until next Monday morning.

Mr. Hellenthal: Your Honor, we have consistently taken the position that in this equitable proceeding that the defendant, nor plaintiffs for that matter, are not entitled to a jury trial. This is not a jury case. The relief sought is wholly and entirely equitable relief and I think that counsel for the City is in complete agreement on that.

The Court: What is the City's position with reference [18] to that?

Mr. Rader: If it please the Court, it is an action which is primarily an action in which it is alleged discrimination, discriminatory rates and discrimina-

tory application. Several items of fact have to be decided and I would assume that we had a right to a jury trial on it.

The Court: Just because there are questions of fact, that isn't what gives you the right of a jury trial. It is the nature of the action. What have you to say about that?

Mr. Rader: The action is pursuant to Territorial Statute. I can't state whether it is an action for loss of damages—it is an application for a refund of——

The Court: It asks for injunctive relief. Unless you contend that is merely camouflage it would appear to be an equitable action.

Mr. Rader: I don't know about camouflage, but I think they probably did want injunctive relief all right. As to the future I assume that the injunctive relief would apply, but as to the past it is the question of discrimination. I think that it is a matter of reasonableness of rates and rate classifications.

The Court: I am inclined to think it is a non-jury case. Well, you may proceed with your proposals then.

Mr. Hellenthal: Your Honor, we have proposed that paragraph 1 be admitted by the defendant—paragraph 1 of the [19] complaint. This paragraph has not been supplemented by supplemental pleadings.

The Court: Well, why does anything like that have to be admitted. It is a matter of record.

Mr. Rader: It is admitted in the answer.

Mr. Hellenthal: It is denied in the answer.

The Court: A denial of something that is a matter of public record is no denial, so you might—

Mr. Rader: There is no question on that. We will admit it.

The Court: That is always disregarded.

Mr. Hellenthal: We propose, Your Honor, that paragraph 2 be admitted for the purposes of the record in this pre-trial conference.

The Court: If it is admitted it is something of which the Court can take judicial notice of.

Mr. Hellenthal: Yes, Your Honor. Paragraph 4 is admitted. Paragraph 7(a), we propose that it be admitted except for possible arithmetical errors in computation.

The Court: Well, I suppose you mean paragraph 7 as supplemented?

Mr. Hellenthal: Yes, Your Honor.

Mr. Rader: If it please the Court, paragraph 7(a), of course, which says “correct billing per plaintiffs theory,” I am unable to read their mind, however, the City has provided—I [20] have gone on our auditor’s report—a complete breakdown of amounts paid to the City, the kilowatt hours used by the plaintiffs and the computation of what their bill would be if the meter readings were combined. Now, I think that there is a \$200.00 or \$300.00 difference. One of the differences arises out of the fact that the plaintiffs contend that \$400.00 damage and \$400.00 a month since January 1 should be included and I think they have included it in their supplemental pleadings. I can’t agree with that, but this is largely a matter of mathematical computation and

I think Mr. Hellenthal has received copies of this, have you not, Mr. Hellenthal?

Mr. Hellenthal: No, not their final computation, but we did work closely with the City people in the preliminary computation.

Mr. Rader: Let me ask Mr. Hellenthal if he would accept our computations?

Mr. Hellenthal: I would be very happy to go over them, yes. I think that, of course, is within our savings clause except for errors in arithmetical computation. I am more interested in the admission as to the body of paragraph 7(a).

Mr. Rader: What do you mean "the body of paragraph 7(a)"?

Mr. Hellenthal: The words beginning on page 2 of the complaint "That plaintiffs are each furnished" as supplemented by paragraph 1 of the supplemental complaint of Richardson Vista [21] Corporation and as supplemented by paragraph 1(b) of supplemental complaint of Panoramic View Corporation.

Mr. Rader: If it please the Court, I am not going to admit to their supplemental complaints because they are supplemental complaints. I think they are trying to change their whole theory of the case. Now, I will admit these computations and I will admit the first preface matter of paragraph 7 of the plaintiff's original complaint.

Mr. Hellenthal: Would you specify that, please?

Mr. Rader: Well, all of that that goes before 7(a).

Mr. Hellenthal: Fine.

Mr. Rader: I will admit that and if they would merely examine our rate computations here as to the correctness of them, and Mr. Hellenthal has been working on this thing with the City auditors more than I have, or we will call an auditor to introduce and prove that our figures are correct if they don't want to accept them.

Mr. Hellenthal: Will Mr. Rader admit the first line of paragraph 1 of Richardson Vista supplemental complaint—the first sentence, rather?

The Court: Well, aren't there 2 supplemental complaints?

Mr. Hellenthal: Yes, Your Honor.

The Court: Which one are you referring to now?

Mr. Hellenthal: Richardson Vista supplemental complaint which was filed March 1, 1955. [22]

Mr. Rader: You mean all of Number 1, that one sentence?

Mr. Hellenthal: The first sentence of Number 1, Mr. Rader.

Mr. Rader: "That during the calendar years 1952, 1953 and 1954, plaintiff Richardson Vista Corporation was billed monthly as if each of plaintiffs' nineteen buildings were a separate customer of defendant." We will admit that.

Mr. Hellenthal: Will Mr. Rader admit the second sentence of paragraph 1 of Richardson Vista supplemental complaint?

Mr. Rader: Admit you were overcharged? Of course not.

Mr. Hellenthal: Is there any portion of that sentence that can be admitted?

Mr. Rader: I will admit that we have charged you in accordance with—and I believe we might so mark this so we know what we are talking about. Will you mark this as Defendant's Exhibit A. We will admit that the defendant, from August 1, 1951, to December, 1954, billed and the plaintiffs paid in accordance with Defendant's Exhibit A for identification. We will also admit that we threatened to continue billing each of plaintiffs as an individual consumer, which I think is what you want, isn't it?

Mr. Hellenthal: Partly. May I examine Defendant's Exhibit A marked for identification—no, it is marked A without qualification.

Mr. Rader: It should be for identification.

Mr. Hellenthal: It isn't complete because it relates only to Panoramic View. I think the subject at this time is [23] Richardson Vista schedule and then later get to Panoramic View.

The Court: You mean you have the wrong paper?

Mr. Reischling: 7(b) is for Panoramic View. It is quite similar to 7(a). We will discuss that, if the court will permit, in a moment.

Mr. Hellenthal: So I would suggest that the paper which is marked Exhibit A be withdrawn and that a new A be substituted and marked merely for identification.

Mr. Rader: If it please the court, we have Panoramic View marked A and Richardson Vista will be marked B.

Mr. Hellenthal: Now, of course, I am not pre-

pared to stipulate as to the accuracy of these things, never having seen them before, but I do agree they should be marked then we will go over them and we will be getting some place. Now, if I understand it correctly a paper consisting of 2 parts representing "Electrical Billing to Anchorage Rental Service for Richardson Vista Apartments—House Meters" and for "Panoramic View Apartments—House Meters" has been marked Exhibits A and B, is that correct?

The Clerk: Yes.

Mr. Hellenthal: Where is the other part?

Mr. Rader: Here it is.

Mr. Hellenthal: The compilation as to Panoramic View is marked Defendant's Exhibit A for identification. The compilation for Richardson Vista—these are both Panoramic View.

Mr. Reischling: May I say for the record [24] that buildings 20 to 33 are Panoramic View as shown on that exhibit so there should be no difficulty.

Mr. Hellenthal: Your Honor, we have no reason in the world to doubt the accuracy of the compilation because to the preliminary compilation we gave our compilation to the City, they in turn gave their preliminaries to us and I think we are off a few dollars. This is a final one I have never seen before and I am almost positive it is correct, but not having seen it I will not admit it at this moment, but we will within a few hours.

Mr. Rader: If it please the court, now in both of these exhibits I want to make it clear that we are not agreeing that either corporation is entitled to

the rates which they contend, but we have for the convenience of the court and for the convenience of the litigants attempted to include them all in one exhibit so as to show the difference.

The Court: Well, as I understand it, all that these tables show is the charges that have already been made against the two corporations.

Mr. Rader: And it also shows the difference in what those charges would have been had all of the house meters been combined and read as one meter on the consumption indicated month by month. In other words, I think it indicates a difference in the theories of billing.

The Court: Well, the difference, as I understand it, is based on the contention of the plaintiffs and the contention of [25] the city.

Mr. Rader: That is correct.

Mr. Hellenthal: Are you prepared, Mr. Rader, to stipulate which schedule was applied at all times and in all points in the compilation at this moment?

Mr. Rader: Yes, it would be our published rate schedules as they were brought down to date.

Mr. Hellenthal: Do you have at your fingertips the dates when the changes were made and what changes were made? In other words, I think we can admit that Schedule C-1 was followed throughout 1951 and probably 1952; then somewhere in 1953 there was a change made; later another in 1954; another in 1955—2 in 1955. Are you prepared to stipulate as to what changes were made and where?

The Court: Well, before you discuss that is

there any possibility of agreeing on these figures as reflected in these exhibits?

Mr. Hellenthal: I am sure—we have asked that the applicable schedules be produced in court and I think they are produced and when we have those papers we will be able to. Can we pass that then, Mr. Rader, for the moment?

Mr. Rader: I think we can handle it right now.

Mr. Reischling: If the court please, before we get into the matter of application of rates to schedules, the court will note that the supplemental complaint of Panoramic View is drawn [26] slightly different than that of Richardson Vista.

The Court: Is it reflected in this exhibit?

Mr. Reischling: Yes.

The Court: It seems to me that in order to expedite this thing you ought to know right now whether you are going to insist on proof that the computations that have been made are correct or whether you can agree that these figures are correct? In other words, if it is going to take a week here to go over the bookkeeping of the City I might as well refer the case to a Master for accounting.

Mr. Hellenthal: No, your Honor, I stated, and I believe correctly, that at 1:00 or 2:00 o'clock this afternoon we will be prepared to say whether these schedules which we have just seen for the first time reflect the true factual picture, but on the question of application of tariffs that can only be determined when the documents that we have demanded are produced.

Mr. Reischling: I wanted to make my point,

if the court please, that we have alleged that Panoramic View used a certain number of kilowatt hours during the period set forth in the complaint, that is, annually, and by the months the City has furnished us as is shown in Exhibit A a total compilation of kilowatt hours together with their computation of a rate schedule. Now, we have alleged in our supplemental complaint that we are entitled to a rate in accordance with the quantity of power consumed by us. In other words, we are not arbitrarily saying we are [27] entitled to Schedule C-1 or Schedule C-2. We contend that is a matter for the court to determine. That is a matter of law on the basis of power that was consumed as to what classification into which we fall, and accordingly it would be determined just automatically as to which rate we are entitled to. That is the manner in which we have amended 7(a) and I think it is a very simple matter. As soon as it has been determined the City can see, as I know they will, the total quantity of power that was used by us, but we are not contending in that paragraph that we are entitled to any special rate, but the rate to which we should be entitled in accordance with the service that is furnished to us and the quantity of power that is used by us. Have I made myself clear on that?

The Court: Yes. I am just wondering now if we are not putting the cart before the horse if the court must first determine what schedule should have been applied, then there is no use of talking about figures here. The compilation of that would

have to be determined first then it would be a matter of computation.

Mr. Reischling: That is our contention.

Mr. Hellenthal: Mr. Rader I believe is prepared to stipulate as to what schedules were applied during various periods. Am I not correct?

Mr. Rader: Yes.

The Court: Well, wouldn't that be a part of the computation? It seems to me what you should try to agree on now is [28] what schedules were applicable.

Mr. Hellenthal: But Mr. Rader will tell us what application of schedules the City has made during all periods.

The Court: But that is a part of the computation, it seems to me.

Mr. Hellenthal: Otherwise we will have to take proof on it.

Mr. Rader: If it please the court, I am completely unable to understand Mr. Hellenthal. He is willing to agree our computations are right which are mitigated on the schedule. What do you mean, you will have to take proof on it?

Mr. Hellenthal: If I go all through this schedule—I know that at different periods here, on different dates during this 4-year period that different rate schedules were applied. Now, where the break-off points are would take me an enormous amount of time to determine and that matter is right at your fingertips.

The Court: Well, why bother at this stage with what schedules were applied. It seems to me all we

would have to have here is the current consumed. If you can agree on that then the court finds what schedules were applicable. That is all we need.

Mr. Rader: That is correct.

The Court: Well, how about agreeing then?

Mr. Rader: That is correct. We have prepared the exhibits. We tried to prepare what they did pay and we tried to follow through their theory consistently as to what they should pay [29] and make the difference which would put it all at the court's fingertips. Right there is what we tried to do with these exhibits A and B.

Mr. Hellenthal: On quantity I anticipate no trouble whatsoever.

The Court: Well, the court doesn't find it satisfactory to say that you don't anticipate it. This is the time to agree on something, if possible, and if you just anticipate agreements, well, you might as well go ahead with the trial.

Mr. Hellenthal: I have got to check every page of this against my figures. I plan to do that during the noon hour.

The Court: You don't trust the City's figures?

Mr. Hellenthal: Oh, yes, but errors and things like that can creep in, but, as I say, I have no reason to distrust them, none whatsoever, but I don't want to buy a pig in the poke.

The Court: Well, it seems to me that we are getting down now to not where we are trying the case, but where we are preparing it for trial.

Mr. Reischling: If the court please, I, of course,

feel that the City has given us a true and correct statement of the power, that was furnished to us which was used by us. I do not want, however, to be bound, and I am certain counsel does not either, by the conclusions that we reach and I think what we are talking about now is the conclusions which the City has reached as shown by these exhibits. Now, they have even tabulated this to show [30] the total amount of money that was paid by Richardson Vista on the one hand and Panoramic View on the other.

The Court: You say they have or haven't?

Mr. Reischling: They have. I mean, it is tabulated on the exhibits. We can concede we paid that much money. They do, however, further have a figure which they deduct from the amount that we paid and we do not know how they arrived at that figure, that is, whether it was combined billing on C-1 rate or C-2 rate or what particular rate they used and that is one of the things we believe that the court will eventually determine, what is the proper rate, so we are merely asking the City to stipulate as to the amount of power that was used and we paid the bills that we say we paid by the money they received and that they were paid in effect on protest, which the record will show they were, and I think the City will concede that inasmuch as this case has been pending since January, 1952.

The Court: Well, it seems to me that if we have the current consumed and amount paid, or if you can agree——

Mr. Hellenthal: We can agree on that.

The Court: But when? Right now?

Mr. Hellenthal: We will agree right now subject

to any errors in arithmetic that the quantities are correct and that the amounts that we paid are correct.

Mr. Reischling: Excepting as to the proper application of the rate which the City has applied on this second figure. We [31] do not know whether or not they used the proper rate in arriving at the figure which they deducted from the amount we paid them.

The Court: I have already announced that is something that will have to be determined by the court, but at the present time it seems to me we need nothing more than an agreement on the amount of current consumed and amount paid.

Mr. Reischling: That is right.

The Court: Well, can we agree on that now?

Mr. Hellenthal: Yes, I believe we have agreed.

Mr. Rader: Yes.

The Court: All right. Now, where do these figures appear? You must remember I haven't seen these exhibits—the total current consumed shown in these exhibits.

Mr. Reischling: In 7(b), Your Honor, the total month by month power used is set forth there by kilowatt hours.

Mr. Hellenthal: Perhaps Mr. Rader can tell us quicker than I can on those totals.

Mr. Rader: Referring to Exhibit A as an example, the building number is the first lefthand column and the months are across the top. The KW Hours, the column under those indicate the kilowatt hours consumed and the figure "billed" or the col-

umn under "billed" indicate the amount that the City of Anchorage billed for those kilowatt hours on the buildings indicated. Now, it has "Totals as Billed" down at the bottom of the lefthand column. That includes the total amount consumed by all of Panoramic [32] View for, as an example, the first column, September, 1951. Then under "Billed" is the total of what they paid the City.

The Court: Then that is sort of misleading, but so long as it is understood that the billing or the amounts paid in each instance coincide with that for which they were billed, why, we can consider the heading as comprehended payment also. In other words, the amount billed was the amount paid.

Mr. Rader: Yes, we agree to that. There is no question about that. Now, the next line is "Total by Combining Readings." Now, that is what they would have had to pay if all of their meters had been combined within Schedule C of the commercial rates of the existing rates at that time, which we understand is their theory of the case. To understand this, Your Honor would have to understand the more you——

The Court: Of course, I understand that, but I think this last item would merely be of some assistance to the Court at perhaps a later stage, but it seems to me all we need here is an agreement on the total current consumed and amount paid.

Mr. Hellenthal: We can agree on that.

The Court: Well, then it seems to me we can go to the next item.

Mr. Hellenthal: The next is paragraph—well, the dates that the different tariffs went into effect and Mr. Rader has indicated he is prepared to give us those dates.

Mr. Rader: Defendant's Exhibit C is the tariff published [33] in the telephone directory.

Mr. Reischling: May I have the date of that counsel, to Exhibit C? You didn't give us the date.

Mr. Hellenthal: May I examine it. Now, I notice you have written on here "published summer 1951."

Mr. Rader: Yes.

Mr. Hellenthal: This Exhibit C for Identification is identical with Exhibit A of Plaintiffs' Complaint, is it not?

Mr. Rader: I believe it is. It is the rates that went into effect January 1, 1951.

Mr. Hellenthal: Can we have, instead of the summer 1951 give the effective date rather than the published date, if you have it?

Mr. Rader: Do you want me to write that on the exhibit?

Mr. Reischling: That will be all right.

Mr. Hellenthal: We have checked it. It is identical to Exhibit A of Plaintiffs' Complaint.

Mr. Rader: I have written on it "January 1, 1951."

Mr. Hellenthal: Fine.

Mr. Reischling: Satisfactory.

The Court: Then you are agreed on that.

Mr. Rader: Yes.

The Court: Does that set forth all of the schedules that are involved here?

Mr. Rader: I didn't understand. [34]

The Court: Does that set forth all of the schedules?

Mr. Rader: No, there have been several revisions since that date and I will produce those right now if your Honor——

Mr. Hellenthal: Now, one more stipulation. Is counsel prepared to stipulate that Exhibit C for Identification was the entire and complete rate tariff in force in the City of Anchorage at that time, that is, from January 1, 1951, until the effective date of the next exhibit you are going to offer?

Mr. Rader: I can only stipulate that it is the rate schedule published in the telephone directory and remained in effect until the next exhibit which I will produce.

Mr. Hellenthal: Do you have any other rate schedules other than those published in the telephone directory during that period?

Mr. Rader: We have no other rate schedules. We have some regulations which will be applicable.

Mr. Hellenthal: And you have produced them?

Mr. Rader: I will produce them.

Mr. Hellenthal: Have you produced them in Court in accordance with our notice to produce them?

Mr. Rader: I think I have them in my possession at this moment.

Mr. Hellenthal: Could I see them?

Mr. Rader: I would prefer we not see them now.

Mr. Reischling: I have one question that has not yet [35] been decided. Is this Exhibit C which was

just stipulated to the exhibit upon which the rates charged Panoramic View and Richardson Vista in 1951 was based? Is this the one?

Mr. Rader: Yes.

Mr. Reischling: It is the one and this is the schedule then upon which the rates charged to these two plaintiffs were charged until the next published revision of that schedule. Is that correct?

Mr. Rader: That is correct.

Mr. Hellenthal: Which will be Exhibit D.

Mr. Rader: Yes.

Mr. Reischling: Then to go just one step further on this stipulation, each subsequent published revision would be the revised schedule upon which the rates charged these two plaintiffs would have been figured during each succeeding period of time?

Mr. Rader: That is correct.

Mr. Reischling: And the rates would have been figured on nothing else other than these particular schedules, is that correct?

Mr. Rader: Counsel keep wanting to limit the rules and regulations of the City of Anchorage Utility Department to these published rates. I will not do that. I will say that these the rates, the schedule of tariffs upon which the rates were computed. I do not admit that it includes all of the regulations of the P.U.D. department as to condition of service. [36]

Mr. Hellenthal: Now, may I ask—well, I don't want to belabor this, but during the period covered by Exhibit C was Schedule C, commercial rate, the rate that was applied by the defendant?

Mr. Rader: Yes.

Mr. Hellenthal: No other of the scheduled tariff in Exhibit C?

Mr. Rader: That is correct, only Schedule C.

Mr. Hellenthal: I am prepared then to pass on to Exhibit D.

Mr. Rader: Do you stipulate you admit it should be Schedule C?

Mr. Hellenthal: From all we know we will admit that. We frankly don't know what the most favorable rate is, but we suspect it is Schedule C.

The Court: If Schedule C embodies the entire schedule then in effect, then, of course, it seems to me that it would have to include the rate charged here.

Mr. Hellenthal: Well, to be perfectly frank about it, for this particular period of time it is Schedule C, but it isn't going to be for the periods of time in some of these succeeding exhibits necessarily. But we do say this, that if Schedule C during 1951 was the most favorable rate applicable to plaintiffs' customers we will go along on that condition, but we do not know what the most favorable is. [37]

The Court: You will go along where?

Mr. Hellenthal: We will stipulate that was the one applied and should have been applied.

The Court: Well, you mean if it was the most favorable rate you are willing to agree. Is that it?

Mr. Hellenthal: Oh, no. If it were the most favorable rate we would definitely agree it should apply.

The Court: That is what I say. You would agree it was the most favorable rate.

Mr. Hellenthal: Yes, Your Honor.

The Court: You are willing to agree that is the rate that should have been charged because it is the most favorable rate?

Mr. Hellenthal: If it is the most favorable rate and we strongly suspect that is the most favorable rate.

The Court: I don't know that that is going to contribute much because, after all, if the Court determines that some other schedule is applicable, rather than the one that has the most favorable rate, you don't contribute anything by merely stating you are willing to take the most favorable rate.

Mr. Reischling: I didn't understand Your Honor's ruling, but I believe that the Court should understand when we talk about most favorable rate we are talking about it in connection with a specific classification that is made, that is all; that each particular classification the Utilities Department may make [38] as to the service it renders consumers. All consumers within that classification are entitled to the most favorable rate. In other words, it must be uniform. I believe that is the law. That is all we are contending here.

The Court: That is the reason why I think it is unnecessary to express yourself with reference to that. If that happens to be the law the Court is going to make that determination, so we needn't go into it now.

Mr. Reischling: That is what I understood, Your Honor.

Mr. Rader: If it please the Court, some of my difficulty is because of the fact that plaintiffs, in their complaint and in conversations until yesterday—it is my understanding that they were limiting themselves to Schedule C and had a concrete contention as to what they were entitled to. By the amended complaint they are saying, “We don’t know what we are entitled to.” Which in effect says, “Come in and give us something. We don’t know.” Some of my schedules did not take into consideration every possible rate schedule unless it was the effective rate C under which we consistently billed them. Now, there is a schedule known as “LP” which is large power. I don’t know the exact effective date of that. I think it was the summer of 1953, but I don’t have with me the actual effective date of that. I assume what they say is, when we say whatever rate is most applicable, why, then I have to produce every rate that we have. Actually, this is as available to them as it is to me. I don’t know why they [39] don’t produce them themselves. They are in the telephone books and they can tell us what they want to do on it, but, at any rate, I have a published schedule of April, 1953. I don’t think the effective date is important because it doesn’t change Schedule C from Exhibit C, but we can put it in. It may have some other schedule that they are interested in—if you would make that Defendant’s Exhibit D for Identification.

Mr. Hellenthal: What is the effective date of that?

Mr. Rader: I don't know, but it doesn't change Schedule C so I didn't consider it of any importance.

The Court: I thought you said it was effective April, 1953.

Mr. Rader: No, it was published April, 1953. Possibly it was published several months before it was effective.

The Court: But at any rate it is the next schedule?

Mr. Rader: It is the next schedule, yes.

Mr. Hellenthal: By published, you mean published in the phone book or on the City Hall bulletin board?

Mr. Rader: In the phone book.

Mr. Hellenthal: You mean that is the first phone book that came out that had it in it?

Mr. Rader: That is correct.

Mr. Reischling: For the record, assuming that we were entitled to that particular rate, I think we are entitled to have the date under Exhibit D and I think it is within the knowledge of [40] the City.

The Court: Except the City has explained why he doesn't have it and it seems to be a good explanation.

Mr. Hellenthal: I see absolutely no change between Exhibits C and D. They are identical.

Mr. Rader: I think there is one change, isn't there?

Mr. Hellenthal: Where is it?

Mr. Rader: I know that Schedule C is identical. That is the only one I thought we were going to be tied in with. Well, for instance, the published rate of April, 1953, doesn't have rural rate schedule and there are several other changes in the thing.

Mr. Hellenthal: I don't see any other changes other than the admission of the rural rate which clearly is not applicable here.

The Court: That would simplify things. If that is the next case we could go on to the next schedule.

Mr. Rader: There are more changes than that. If you admit you don't need it for your theory we will forget about it.

Mr. Hellenthal: That is right. We will leave it the way it is. Let's go on to the next schedule.

Mr. Rader: There are several changes in it.

The Court: Let's see, that is marked "D," is it?

The Deputy Clerk: Defendant's Exhibit D for Identification.

The Court: Well, I don't think these exhibits, when you [41] agree on them, ought to be marked for identification. They ought to be marked as exhibits in the case.

Mr. Rader: I was going to suggest that and overlooked it. Is that satisfactory with counsel?

Mr. Hellenthal: Yes, it is on these exhibits.

Mr. Rader: Defendant's Exhibit E is the rate that went into effect July 1 of 1954.

Mr. Hellenthal: Anything further, Mr. Rader?

Mr. Rader: With permission of counsel, so that the Court may keep them clear—the exhibits speak

for themselves—I'd like to write on that exhibit the effective date. I don't believe it has it.

Mr. Hellenthal: Yes, will you write the effective date on it?

Mr. Rader: I am writing at the bottom.

Mr. Hellenthal: You have written "Effective date July 1, 1954." Anything further, Mr. Rader?

Mr. Rader: We have one more rate schedule.

Mr. Hellenthal: May I ask in connection then with D—I read Schedule (LP), large power users from Exhibit D. From Exhibit E, "This schedule is applicable to each meter furnishing electricity under Schedules (D), (C), or (P) and excluding Schedules (B), (WD), and (WC), when the monthly consumption is 10,000 KWH or more per month per meter. First 10,000 KWHrs. @ .0435. 10,001 to 40,000 KWH @ .035 per KW. Over 40,000 KWH @ .0285 per KW. [42] the 5% reduction does not apply to Schedule (LP). Any special rate other than those listed in Schedules (D), (C) or (P) and not otherwise excluded, are not subject to the 5% reduction." Mr. Rader, are you prepared to stipulate that that schedule which I have just concluded reading was placed into effect February 1, 1953, rather than on July 1, 1954?

Mr. Rader: I am not prepared at this moment to stipulate that it was. As I say, that is a different schedule than I had anticipated we would be using in Court. I will check it and find out if it is specially handled. I don't know.

Mr. Hellenthal: Then are you prepared to qualify the effective date by perhaps inserting the words, "Except as to Schedule (LP)"?

Mr. Rader: Well if you have information to the contrary we will limit the stipulation. I don't know.

Mr. Reischling: I think if counsel could find out the effective date and advise us after the recess that would be satisfactory.

Mr. Hellenthal: Now, Mr. Rader, again considering Exhibit E, I shall read the last printed paragraph of Schedule C, "Schedule (C) Commercial Rate subject to 5% reduction on all consumption over the minimum monthly charge." Was that done the effective date of that change?

Mr. Rader: That was effective on all billings after July 1, 1954. [43]

Mr. Hellenthal: But not the LP to your knowledge?

Mr. Rader: I don't know about the LP. I will have to examine that rate.

Mr. Hellenthal: Mr. Rader, are you prepared to stipulate that the two principal and in fact only changes in Exhibit E were the inclusion of Schedule LP and the 5 per cent reduction to commercial C rate?

Mr. Rader: I am sorry, I didn't understand you.

Mr. Hellenthal: Of course, the records speak for themselves, I suppose, but I will withdraw that, and we are prepared to go on to Exhibit F.

Mr. Rader: If it please the Court, if we could leave Exhibit F open—it is the currently published schedule effective January 2 in the latest edition of the telephone book. I am sure that plaintiffs have several of those schedules in their possession at this moment, don't you?

Mr. Hellenthal: We have something we cut out of the phone book entitled "Light and Power Tariff, effective rate on all billing starting January 2, 1955, and thereafter." Then we have another piece out of the phone book that gives "Effective tariff starting February 10, 1955, and thereafter." Then we have another one saying "Effective tariff starting March 1, 1955, and thereafter." We have three.

The Court: Well, do we need to concern ourselves with the one that is not in effect? [44]

Mr. Hellenthal: Well, I have here the first one which we think would be "F."

Mr. Rader: Might as well make that Exhibit F.

Mr. Hellenthal: Will you stipulate that is the full and complete tariff effective January 2, 1955?

Mr. Rader: I will stipulate that is the rates on which the billings were computed in effect at that time and that is all.

Mr. Hellenthal: Yes. Now, I will hand counsel—then you don't have the February change?

Mr. Rader: No.

Mr. Hellenthal: This is the March, 1955, phone book which was published last week, at least we got our copy last week, and it has something in here entitled "Effective rate on all billing dated February 10, 1955, and thereafter." I will hand that to counsel and see what he can come up with on that one. Now, the last thing that I think has a bearing would be another page in this book entitled "City of Anchorage Urban Light and Power Rates, effective all billing dated May 1, 1955, and thereafter."

Mr. Rader: All right.

Mr. Hellenthal: It has some relevancy so I would be willing that——

The Court: How would that have any relevancy?

Mr. Hellenthal: I don't exactly know myself except we are interested in the future and we ask that future incorrect applications of existing favorable rates be enjoined. [45]

Mr. Rader: Well, it, of course, depends on the outcome of this case so this one schedule may have to be revised. I don't know what will happen there.

The Court: I don't think we have to concern ourselves with any proposed future schedule.

Mr. Hellenthal: Well, I don't have a knife or anything here, but why don't we just give them the book and stipulate.

Mr. Cottis: I have a knife.

Mr. Hellenthal: Let's go on then. Now, are those the complete rate schedules we have stipulated to?

Mr. Rader: Mark that Exhibit G.

Mr. Hellenthal: Exhibits A to G, inclusive.

The Court: What does G show as to the effective date, if anything?

Mr. Rader: February 10, 1955.

Mr. Hellenthal: The last two, it is my understanding both have the effective dates incorporated in the provisions of the schedules themselves. So now I think the next step will be paragraph 11 of the complaint.

The Court: Well, I think that is superseded by Exhibits A and B.

Mr. Hellenthal: Now, let me collect my wits here. Yes, it is tied in with 7 as supplemented and

I, too, believe that the stipulation that was made as to paragraph 7 would equally apply to paragraph 11. 11 refers by reference to 7 which includes A and B [46] so any stipulation entered into applicable to A and B would be equally applicable to paragraph 11.

The Court: Well, I don't think there is any dispute on that.

Mr. Hellenthal: Then I should like to proceed to paragraph 3 of the complaint. It is our understanding that the City will stipulate to the truth of that paragraph if the following is added commencing with the words "that the streets"—except the last clause in the paragraph commencing with the words "that the streets." In other words, our preliminary discussions have indicated that if the words "that the streets and ways within both of said projects are the property of plaintiffs and have not been dedicated to the use of the public generally," our previous understanding has been if those words are omitted and the following words substituted the paragraph can be admitted, and substituting for those words I read the following, "That since"—

The Court: It is set forth in this proposed stipulation so you needn't read it.

Mr. Hellenthal: Ask that the words as set forth in the proposed stipulation be substituted and may I ask counsel for the City if that would be agreeable and if not what suggestions he would have to offer.

Mr. Rader: In response to Mr. Hellenthal's inquiry, it is the same thing I told him yesterday;

that both tracts are [47] unsubdivided and located within the City of Anchorage. We admit that, except for the fact that we consider the streets as subdividing the tract; the streets that exist, or if he wants to say "undivided except for the streets" we will admit that. Further, that the language in the proposed stipulation is acceptable providing that the dedication of the streets to the City of Anchorage for a period of 75 years is more or less a permit.

The Court: Well, as I understand it, all you want to stipulate to is the factual situation.

Mr. Rader: Yes.

The Court: Well, why in the world should there be any difficulty in agreeing on that, that is an existing thing visible to everybody.

Mr. Rader: I thought we were agreed on it. With the changes that we are now making I don't think there is any issue on it. The rest of the language in the proposed stipulation is proper except for the last sentence of that proposed language or the last clause which reads, "though dedication in fact has been accomplished." I don't stipulate to that. I don't understand that to be a fact. I don't believe there is any argument about that.

The Court: Well, then as I understand it, as set forth in the proposed stipulation you agree, do you not, but not as to the last clause?

Mr. Rader: If you insert additional words before this [48] clause "except for streets the tract is unsubdivided."

The Court: But where would you put that in the quoted material?

Mr. Rader: You would have to make it the first sentence which is omitted under the proposed stipulation.

Mr. Reischling: If the court please, I have listened to counsel's suggestion, but I have never heard before that an undivided tract becomes a subdivided tract with reference to streets as a legal matter. Now, actually, as a matter of fact, both Richardson Vista and Panoramic View were large unsubdivided tracts and they still are and Panoramic View just did dedicate certain streets to the City, but it is still an unsubdivided tract included within which are dedicated streets for the period of the leasehold.

Mr. Hellenthal: In the case only of one project.

The Court: Why do we have to speak in legal terms or in terms of legal conclusions? Why not say what the facts are? It is improper to stipulate to questions of law anyhow.

Mr. Hellenthal: What do you have here? A map of the project?

Mr. Rader: Yes.

Mr. Hellenthal: Do you want to stipulate that in the record?

Mr. Rader: Yes, stipulate that the streets are as they exist. [49]

Mr. Hellenthal: We will certainly go for that.

The Court: It may be marked as Exhibit H.

Mr. Rader: You will stipulate that buildings No. 1 through 19 is Richardson Vista; buildings 20 through 33 is Panoramic View and that the remainder of the buildings shown on there are three housing projects known as Hollywood Vista?

Mr. Reischling: Of course, that has no connection with this particular case.

Mr. Hellenthal: They are not a party to this case.

The Court: We will recess to 2:00 p.m.

(Whereupon, at 11:50 o'clock a.m., the court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

Mr. Rader: If it please the court, there is one thing that counsel asked me to stipulate to this morning and I am prepared to now, and that is the LP rate on Defendant's Exhibit E. It is called Schedule LP, Large Power Users. That the rate went into effect February 1, 1953. I think that was what you asked me to stipulate to this morning.

Mr. Hellenthal: I made that request and that you have complied with. [50]

The Court: What does that bring us down to?

Mr. Hellenthal: That brings us down, your Honor, to where we left off this morning, which was in discussing paragraph 3 of the complaint and Mr. Rader was discussing the matters in the stipulation on page 2 of the stipulation about dedication and the like.

The Court: But we passed over that.

Mr. Hellenthal: Then he passed over that and went to this map which——

The Court: That is also water over the dam. Now, we must be down to paragraph 3 of the proposed stipulation.

Mr. Hellenthal: Yes. Now, again we go back to paragraph 3. Now, does counsel for defendant admit all matters? It isn't perfectly clear in my mind that all matters in paragraph 3 of the complaint down to the last clause beginning with the words "that the streets" is admitted.

The Court: Well, I think what occurred was that I expressed the opinion that we need not concern ourselves with any stipulation expressed in legal terms.

Mr. Hellenthal: Those are all facts.

The Court: That is all the court is interested in, the actual situation there and that was portrayed by Exhibit H.

Mr. Hellenthal: No, your Honor, there is more to paragraph 3. There are more facts contained in paragraph 3 than Exhibit H portrays. [51]

The Court: Well, what are they?

Mr. Hellenthal: Some of them are that the units in Panoramic View consist of 8 buildings with 22 units, 4 with 16 and 2 with 12. That does not appear on Exhibit G or Exhibit H. Let me make sure. On Exhibit H, rather than G—and if I may correct the transcript. So I ask counsel if he will stipulate that the facts—and I submit that there is nothing but facts in paragraph 3 down to the last clause—will you stipulate that those facts are true and admit them?

The Court: Well, you have already agreed in connection with Exhibit H that there are 19 buildings of the Richardson Vista Corporation and—

Mr. Hellenthal: 14 of Panoramic View Corporation.

The Court: Now, in addition to the number of buildings you would also like to have the defendant agree as to the number of units?

Mr. Hellenthal: Yes, your Honor.

Mr. Rader: We so agree.

Mr. Hellenthal: Then we are in agreement down to the last clause.

Mr. Rader: Well, excepting insofar as you say both tracts are unsubdivided and both in the City of Anchorage. We admit they are in the City of Anchorage. We admit the subdivision is as represented on the map, if there is a subdivision. We will further agree with you as to the lease condition, the fact you are [52] leasing from the Government 50 year or 25 renewal option.

Mr. Hellenthal: Why don't we take them one at a time.

Mr. Rader: If you hear anything that I am saying that is wrong, if there is anything you don't agree with—I understand those to be the facts.

Mr. Hellenthal: I will go to the subdivision. You say if it is subdivided you will agree it is. I will go on that.

Mr. Rader: That is, as represented on the map. I believe it is Exhibit H.

Mr. Hellenthal: Yes.

Mr. Rader: And that the streets located around Panoramic View have been dedicated at least for a period of 75 years, being the period of the plaintiffs' interest in that. That the streets around Richardson

Vista have not been dedicated because of the fact it is on a military reservation.

Mr. Hellenthal: I don't know the reason.

Mr. Rader: Leave off the reason, but they have not been dedicated, and you will stipulate to the further fact they are located on a military reservation, will you not?

Mr. Hellenthal: Now, first I believe your proposed stipulation is correct except that the Panoramic View dedication was made within the last 4 months. Is that not correct?

Mr. Reischling: The Panoramic View dedication was made within very recent months. I don't see the materiality as to the time. I cannot state the time exactly, but that is a matter of [53] record.

Mr. Hellenthal: Now, the terms of the leases. I think we might as well get that perfectly clear. The lease on Richardson Vista is for 50 years.

Mr. Reischling: The lease on Richardson Vista is for 75 years. The lease on Panoramic View unsubdivided tract is for 50 years or with the option for the lessee to renew in 25 years.

Mr. Hellenthal: And the other is an express 75 years.

Mr. Reischling: That is correct.

Mr. Rader: We also agree the City exercises police jurisdiction over the streets, that we maintain them with City equipment, snow removal with City equipment and handling traffic on them. I don't know of anything else.

Mr. Hellenthal: I can't see any materiality to that.

Mr. Reischling: Isn't it similar to the words of the complaint where it was set forth the City exercised complete and full jurisdiction over the streets? Isn't that very simple?

Mr. Hellenthal: Now, will counsel for the defendant agree to the language of the stipulation as qualified by the statement we have just made?

Mr. Rader: I agree to the stipulation we just made. I think it is all inclusive. If you know anything additional to that or anything that should be changed, let's discuss it.

Mr. Hellenthal: Then let's add that the defendant's agreement with plaintiff has asserted full jurisdiction over the [54] streets located on both projects. Is that agreeable with counsel for the defendant?

Mr. Rader: On the one that has been dedicated that has been done by agreement. On the other it is by tacit understanding. We have, as a matter of fact, exercised jurisdiction, but whether or not we will next week is another thing.

The Court: Is the exact status of these streets so material to this controversy?

Mr. Hellenthal: Not too material, no.

The Court: What are we quibbling over?

Mr. Rader: They have pleaded them. They may be material to this case. I assume they put them in the complaint for a good reason.

The Court: Well, it isn't apparent to me and it hasn't been stated.

Mr. Hellenthal: Then you will so stipulate?

Mr. Rader: Yes.

Mr. Hellenthal: Now, we go to paragraph 5. Will counsel for the defendant stipulate that the following be substituted for the present paragraph 5, "That each of plaintiffs' projects——"

The Court: He has the proposed stipulation, has he not? It is not necessary to read it. Just ask him if he will agree to that.

Mr. Hellenthal: Will you agree to proposed stipulation—paragraph 5 of the proposed [55] stipulation?

Mr. Rader: Yes.

Mr. Hellenthal: Paragraph 4 of the proposed stipulation?

Mr. Rader: I am unable to stipulate to that.

Mr. Hellenthal: May we have leave of the court then to amend the complaint to insert the word "claimed" before the word "accordance" in line 1?

The Court: It doesn't seem to make sense. How would it read?

Mr. Hellenthal: It would read as follows, your Honor, paragraph 8, "That in claimed accordance with the electrical code of defendant City of Anchorage——" rather than as it presently reads, which is, "That in accordance——"

The Court: Well, is there some objection to that amendment?

Mr. Rader: No, I have no objection to the amendment.

The Court: It may be so amended, but you don't stipulate to the facts as alleged.

Mr. Hellenthal: Then we go to paragraph 5 of the proposed stipulation. Is that agreeable to defendant, taking into consideration that in lieu of Exhibits A, B, and C, we now have Exhibits C to G, inclusive.

Mr. Rader: No, I stipulated to the exhibits as far as I know. I am not in position to stipulate that those are the full and complete rate schedule of defendant, promulgated, published and in effect, governing electric consumption of customers of the [56] defendant, together with the conditions limiting and governing the furnishing of service as set forth. I am not in position to admit that.

Mr. Hellenthal: I wonder how we are going to find that out.

The Court: Well, isn't the burden of proof on you?

Mr. Hellenthal: I think we have got it already by means of Exhibits C to H as amended by the further stipulation as to the February 1, 1953, change. As to that aspect I am sure, but as to the full and complete rate schedule I understand counsel for the City to say that he doesn't know what the full, complete and comprehensive rates for the City are at all times during this period mentioned in this lawsuit, and, frankly, when he says that I am stopped.

Mr. Reischling: If the court please, may I interject a comment here. If the court will take a look at the answer of the City which was filed to the original complaint and compare the allegations of paragraph 8 of the original complaint which the

City answered it will at once become apparent that all this amendment to this complaint is, is to set forth the only published rate schedules we have been able to find and the rate schedules which the City itself brought in here this morning in answer to our Notice to Produce and this particular paragraph, excepting as it is specifically set forth in the amended portion, was admitted by the City in its answer. Now, how the City can come along and [57] say, "We did admit before that this exhibit which you attached to your complaint was the full and complete rate schedule—which it was as of the date of the answer—and now deny that on the rate schedules that they have brought in." That in effect is what they are doing. Their answer said, "As of January or February, 1952, the exhibits which you attached was the full and complete rate schedule." All this particular amendment does is to bring this case up to date and to add to these additional promulgation of rates as have been published by the City of Anchorage and the City, of course, has the power. They are the ones who publish the rates and we get them like you do or like any other user does when they are promulgated and published and that is the only way we can get them. Now, if they deny that these are the rates—if they deny that what they have now given us are the complete rates then I submit to the court that it is up to them to produce whatever rates apparently there may be; that we have no knowledge of it.

Mr. Rader: If it please the court, this stipulation is not for the purpose of finding out rates. It is for the purpose of setting forth all these conditions and limitations to the City Service Policy and their regulations concerning the City Service policy. They understand very well why they amended this. If there was no reason for amendment we wouldn't have the present hassle here right now. That stipulation includes a lot more than rate schedules. I am willing to stipulate that so far as I am aware that the rate schedule we have previously introduced in evidence are the full and complete rate schedules, but they are [58] not regulations which completely provide for enunciate the policy and the regulations concerning conditions of service, and, this amendment, of course, is to establish that I assume. Now, I am admitting everything that Mr. Reischling says he wants admitted, but his stipulation goes considerably beyond that.

Mr. Reischling: May I submit, your Honor, in answer to counsel's statement here that a promulgation of rates, as the City of Anchorage promulgates and makes effective, forms a contract between the users of the service and the City. Now, certainly a consumer cannot be bound to a contractual obligation upon which he knows nothing at all and if counsel is taking the position that they have rules and regulations which they keep within the bosom of the City and are not available to anyone else, I submit we can't try a lawsuit on that basis; that we have the right to try this lawsuit on the basis of the contract which the City

has published and upon the rules and regulations which they have put into effect to govern the use of power by users in this community, and we have also demanded of them—and I will say this, while it is true that the formal written notice was only served upon counsel yesterday this matter has been discussed with him orally before and is no surprise and——

The Court: But what I want to know is why haven't you resorted to discovery process earlier if you want all this information?

Mr. Reischling: Your Honor, on the basis of the City's [59] answer as of February of 1952, at which time only one rate schedule had been published, we assumed on the basis of their answer that they admitted that paragraph; that that was the complete schedule. All we have done is bring our complaint up to date so that the amounts could be figured on the schedules that have since been published from time to time. And in paragraph 2 of our Notice to Produce we asked them to produce at the trial of this case all published rules and regulations pertaining to the furnishing of electrical energy by the City of Anchorage to its electrical customers, if any, other than those included in the tariffs referred to in paragraph 1 above in effect.

The Court: I understand you made this demand, but my point is that you have waited too long. You have waited until the eve of trial before you make the demand instead of resorting to the discovery process. That is why we are in the mess we are in now.

Mr. Reischling: It was only, your Honor, because they had refused to stipulate that we began to wonder that there are other rules up to that time. We had no knowledge they might have other rules.

Mr. Hellenthal: We can give you the answer to it right now. There are no others.

The Court: No other what?

Mr. Hellenthal: There are no other rules.

The Court: You are apparently seeking a concession from [60] the city that there are such rules or that there is something else.

Mr. Hellenthal: We want to stipulate there aren't, but this is the only way we can get it out of them. I know the answer, but I can't bind them. I want them to tell us and I think they should.

The Court: It just seems to me that when you filed your supplemental complaint you went on the assumption of status quo and that is where it seems to me something was unwarranted because you thereafter suspect the rate schedule has been revised or something and so you come here on the eve of trial and no wonder you have difficulty getting counsel, on such short notice, to make the concessions that would undoubtedly be made had be had adequate opportunity to look into this.

Mr. Hellenthal: Actually, your Honor, we met Monday on this matter and there was no trouble about it then and, as I say, if they had 3 weeks it wouldn't make any difference because there aren't any others.

The Court: Well, if you are so sure of that what do you want a concession for, or an admission of that for?

Mr. Hellenthal: I suppose we can resort to a subpoena. We can subpoena the same things.

The Court: Well, as I understand it, then the dispute now is over the possible existence of rules and regulations governing service. Is that it?

Mr. Rader: Apparently so, your Honor. Our understanding [61] before was that these published rates in the phone directory were our rates. This is the first time anybody discussed with me or ever inquired about what other service regulations we had connected with the utility regulations. Now, I don't know who they have talked it over with but they haven't discussed it with me. My position is that can get all kinds of, as you say, discovery matter and I don't know what their lawsuit is for. Sure, I have a good idea and was prepared for some of it and got prepared for the rest of it, but as this Notice to Produce here will show what they have asked me to produce is impossible for me to produce and matters which were never discussed before by anyone. We have the rates on the exhibits, but there are certainly a good many other conditions to our servicing of a customer on the electrical utility.

Mr. Hellenthal: What are some of them?

Mr. Rader: One of them is we don't—

The Court: I don't care for you to discuss that. If there is no concession between the parties here on this particular point, why, we will have to pass on to the next item.

Mr. Hellenthal: Our next point, your Honor—well, it is contained in paragraph 7 of the proposed stipulation—and may I ask the City's position as

to paragraph 6, rather than 7? Paragraph 6 of the proposed stipulation.

Mr. Rader: If it please the court, paragraphs 6, 7, 8, 9, 10 and 11 all seem to amend the complaint to make what they [62] say "the most favorable rate." As I understand this lawsuit I am certain if they had stated that in their original complaint I would have by some method attempted to find out what they were claiming as the most favorable rate so I could prepare exhibits as to the most favorable rate. I would have done something to find out what they were talking about when they say "most favorable rate" if in the original complaint they had put down what they paid under protest on one rate and one schedule and put down plaintiffs' theory of the case. By computation and working backwards we tried to figure out, and I think we did figure out what the theory of their case, of what they were contending is. Now they come into court the day before the trial—actually I think they said something about this Monday. I told them I wouldn't stipulate to such a thing because I don't know what they are talking about when they say "most favorable rate." I don't know what exhibits can be produced on most favorable rate. They allege no certain computation of their theory in their complaint. Now they come into this court and say, "Please, your Honor, tell us in court what our most favorable rate is." They can pick out the most favorable rate themselves. Certainly, they don't have to rely upon us or this court to tell them how to make their

mathematical computation of the most favorable rate under their theory of the case, right or wrong. That is the reason I don't admit all of those changes. I admit they are entitled to the most favorable rate. They plead they were entitled to a certain rate. Now, they [63] say, "We don't want to limit ourselves to that rate. We want the most favorable rate, whatever it may be."

The Court: Of course, it is obvious that no one can stipulate to anything of that kind. That is like saying, "Well, I will agree that you should recover the verdict that you do recover." Well, those 3 paragraphs of the proposed stipulation, 6, 7 and 8, would be similarly affected by that advice so we will have to go on to Number 9.

Mr. Hellenthal: Your Honor, I then ask that plaintiffs be permitted to amend their complaint by making the changes set out in the stipulation to paragraphs 6, 7 and 8 thereof.

The Court: Is there any objection to that?

Mr. Rader: There certainly is. I don't know what the most favorable rate is. I think it is up to them to——

The Court: Let them prove it.

Mr. Rader: Well, if I knew what they are claiming I could perhaps adduce some counterproof, but if I am going to be forced in a position here—they may be proving a rate that might take me with City employees over there a couple of weeks to compute. We computed A and B, what their theory was. We went to a lot of work and here they say, "We may have something else involved."

The Court: You just got through saying a few minutes ago they were entitled to the most favorable rate, whatever it would develop to be, but now your point is you would be prejudiced [64] by lack of time?

Mr. Rader: Absolutely. They have to plead it. Tell us what their proposition is.

The Court: Well, the amendment will be allowed, but if it develops that you are prejudiced, why, the court will take appropriate action of one kind or another.

Mr. Hellenthal: Now, your Honor, paragraph 9. Your Honor has ruled, have you not? Mr. Cottis thought you had not. I don't want to interrupt you.

The Court: Yes, I have ruled that the amendment will be permitted, but if it appears that by reason of making these amendments at the 59th minute the defendant has been prejudiced in his defense, why, the court will have to take appropriate steps to wipe out that prejudice.

Mr. Hellenthal: One thing for the record. Counsel for the defendant indicated that this had not been agreed to at Monday's conference. We should like to show in the record that it was agreed to at Monday's conference.

The Court: What purpose would be served by that? The court is not going to go into any collateral disputes here.

Mr. Hellenthal: I merely wanted to make that statement for the record. Paragraph 9.

Mr. Rader: I won't admit that. They can prove it.

The Court: You say you will admit it?

Mr. Rader: I won't. [65]

Mr. Hellenthal: Your Honor, we have some 70 or 80 letters here of protest from each corporation that were submitted monthly with the checks for utility services to the defendant and on which an acknowledgment of receipt has been signed in each case by a City clerk and I suppose this forces us to introduce the 70, 80 or 90 letters in evidence.

The Court: Why won't the defendant admit that?

Mr. Rader: If he will put those in a bundle for me I will look at them tonight and maybe I can admit them.

The Court: You mean you have no knowledge or no one in the City has no knowledge?

Mr. Rader: I am not certain, but maybe someone in the City does have knowledge. The City, if it please the court, has 300 or 400 employees and it is pretty hard for me to know whether they have knowledge of something or not and I think it is a lot easier for them to show me the file on which the protest is based. I will check the accuracy of the same and I will stipulate they sent the letters they claim they sent.

Mr. Reischling: We have 2 files and counsel can look at it in 2 seconds.

Mr. Hellenthal: The originals are all with the City.

The Court: Well, but are these payments with which protests are transmitted made to one employee of the City or to one office?

Mr. Hellenthal: The letters are submitted to the [66] City Clerk-Treasurer, City of Anchorage. All utility bills are paid to the City Clerk-Treasurer.

Mr. Rader: I will be prepared to stipulate to this in the morning I feel sure.

Mr. Hellenthal: Fine, we will let it go. Now, the next paragraph is Number 11 and we presume that since the City objected and will not stipulate to paragraphs 6, 7 and 8, and based upon that assumption, I move that the complaint be amended so that in the 4th line of the prayer for relief the words, "most favorable," be substituted for the word "commercial."

The Court: The amendment will be allowed subject to the same condition.

Mr. Hellenthal: Now, your Honor, the next matter we wish to bring to the court's attention in the pre-trial conference is the Notice of Demand to Produce, a copy of which is in the court's file, and I ask counsel for the defendant if the electrical rate schedules specified in A, B, C, D and E of paragraph 1, together with all other matters sought in paragraph 1, have been produced in court?

Mr. Rader: Counsel knows as well as I do what we have produced here. I think everything is there. You can answer that as well as I can. If it has been produced it is in evidence here in our exhibits.

Mr. Hellenthal: I ask counsel for the defendant if the matters referred to in paragraph 2 of the Demand to Produce are [67] present in court?

Mr. Rader: I can't state whether they are or

are not. Since receiving this at 2:30 yesterday I have tried to find out what we have and I have a significant portion of it. Whether or not there is more I honestly can't say.

Mr. Hellenthal: Could we then, please, have what materials you do have in court?

Mr. Rader: Do you want a copy of the National Electrical Code?

Mr. Hellenthal: Indeed I do.

Mr. Rader: I assume this will be returned or you will pay for it?

Mr. Hellenthal: I can't guarantee it.

Mr. Rader: Incidentally, I'd like to have this document marked as Defendant's Exhibit I, I believe, called "Ordinance No. 55 of the City of Anchorage."

Mr. Hellenthal: Your Honor, now my interpretation is that the fact we ask for a document doesn't automatically make it an exhibit in this case.

The Court: Well, it wouldn't, but do you object?

Mr. Hellenthal: Yes, I do. I haven't seen it.

Mr. Rader: It is only for identification.

Mr. Hellenthal: You didn't say that. As long as it isn't an exhibit it is all right with me.

The Court: You mean there is some ordinance that [68] contains these rules and regulations? Is that what you offer?

Mr. Rader: Yes.

The Court: It will be admitted in evidence. I don't know why you should quibble over that.

Mr. Hellenthal: I know it was repealed. That is why I am quibbling over it. I know Ordinance 55

was repealed in 1949, if that is what it is. I haven't seen it, but I strongly suspect it is Ordinance 55.

Mr. Rader: If it please the court, I meant to say, if I didn't say, that should be offered for identification because I know that there will be an argument as to its repeal and whether or not it is still effective. That is why I meant to ask it be marked for identification.

The Court: There is no use in marking it for identification. It will be marked as an exhibit just as any other exhibit in the case. Even though it was repealed it probably would apply to at least a part of the period.

Mr. Hellenthal: No, it was repealed in 1950 at least.

The Court: Well, there is a dispute over that so I am not going to resolve the dispute.

Mr. Hellenthal: Of course, we will save all objections as to competency and the works.

Mr. Reischling: As long as the exhibit has been introduced, may I see it?

Mr. Rader: I would like to ask counsel if they could [69] stipulate that the National Electrical Code has been the code of the City during the period in question?

Mr. Hellenthal: The National Electrical Code, to the best of my recollection, was enacted by the City in 1949, and I will so stipulate.

Mr. Rader: I assume that in that Notice to Produce that that includes only those in effect up to the present time and not the ones which I assume will be put into effect?

The Court: What are you referring to now? Are you referring to rules and regulations?

Mr. Rader: Yes.

Mr. Hellenthal: Prospective rules and regulations I don't think are material.

Mr. Rader: We have some that are published and are prospective.

Mr. Hellenthal: Have they been duly enacted by the City Council, promulgated and passed and approved by the City Council pursuant to City Code?

Mr. Rader: Yes, they have been approved, however, the effective date is May 1, 1955.

Mr. Hellenthal: But were they passed and approved under Article 3, Chapter 3 of the City Code?

Mr. Rader: I believe they were.

Mr. Hellenthal: I doubt they are material, but I would like them made a part of the record. [70]

The Court: I think that somebody ought to have some idea in what respect they will be material.

Mr. Rader: I don't know in what respect they will be material.

Mr. Hellenthal: I don't either.

The Court: Let's defer it until it becomes evidence itself.

Mr. Hellenthal: Could I have an opportunity to formally inspect it? I have not seen it before. Do you have anything further in connection with the Demand contained in paragraph 2 of the Notice of Demand to Produce?

Mr. Rader: Those matters contained in the General Code—which you have.

Mr. Hellenthal: You have nothing other than which you have published—ordinances of the City?

Mr. Rader: To the best of my recollection. Again, your Honor, I don't want to be foreclosed from producing something if I find something because if it is material—this was given to me yesterday afternoon and I turned it over to whoever was around to gather this up.

The Court: You want to agree with this reservation?

Mr. Rader: With the reservation if I find any more they will be produced.

The Court: Under the circumstances I think it will have to be accepted. [71]

Mr. Hellenthal: Do you have any documents in mind that might possibly be material that you are worried about?

Mr. Rader: No, I don't.

Mr. Hellenthal: Now the matter covered in paragraph 3 of the Notice of Demand to Produce.

Mr. Rader: Yes, I have the original.

Mr. Hellenthal: May we have that please, or may it be marked in the record in the case?

Mr. Rader: I will have it available for you when you get ready to introduce it. That is a notice to produce and that is all I will do for you.

Mr. Hellenthal: We are trying to help the court.

Mr. Rader: I am going to make you introduce that. It has a lot of hearsay in it and a lot of improper facts and I want your——

Mr. Hellenthal: Can we see it?

Mr. Rader: It is identical to the copy you showed me yesterday.

Mr. Hellenthal: May we see it, please?

Mr. Rader: Is that the one you are referring to?

Mr. Hellenthal: Yes. I believe this should be marked for identification or perhaps marked in some other way.

Mr. Rader: You have an idea I am going to——

Mr. Hellenthal: I think I am entitled to use it for what it is worth. [72]

Mr. Reischling: At any rate it would be in proper order to mark it and subsequently refused, but I think it at this time should be marked, it having been produced.

Mr. Rader: You are correct.

The Court: Well, as I understand it, then you anticipate that you will object to its introduction in evidence?

Mr. Rader: Yes, your Honor.

The Court: Well, so long as you are going to do so, it can only be marked for identification.

Mr. Hellenthal: That, your Honor, of course, is exactly the same objection we made to Ordinance 55. We will probably object to it on the ground that it has been repealed and we don't want it since it has been.

The Court: I don't think the situation is at all like this one. We know it is going to be disputed as to whether it was repealed and in order to pass on that question we have got to have the Act that is said to have been repealed.

Mr. Hellenthal: Yes, and there may be other questions on that as to materiality. Not having read it I can't tell.

Mr. Rader: Is that Plaintiff's Exhibit No. 1?

The Deputy Clerk: Yes.

Mr. Hellenthal: Now what is Ordinance 55 marked as?

Mr. Rader: Defendant's Exhibit I. Is that correct?

The Court: Yes, it should be I.

Mr. Reischling: It has not been marked for identification. [73]

Mr. Hellenthal: It has been marked as an exhibit. Now, to get our record perfectly clear I think we should also mark the 1953 edition of the Electrical Code in some manner. It is going to be some part of the record in this case and I think it should be marked.

The Court: Well, apparently there is no objection to it.

Mr. Rader: No.

Mr. Hellenthal: I don't want to be fuddy-duddy, but I want to make a good record. I don't want to try this thing in a sloppy fashion.

The Court: It may be marked. I guess that will be J.

Mr. Hellenthal: And I think also that the electrical rates and service conditions effective May 1, 1955, which was passed and approved by the Council, apparently in January or February of this year, should also be marked.

The Court: I have already ruled on that, so let's go to something else.

Mr. Hellenthal: Now, in answer to paragraph 4 of the Notice of Demand to Produce.

Mr. Rader: I have that.

The Court: Can you agree on its introduction or is there going to be a dispute about that?

Mr. Rader: Well, I think most of it is hearsay and most of it is immaterial. I don't agree to its introduction. We have here some opinions of persons not present in court and we [74] don't have the opportunity to cross-examine them on it; whether they are experts I don't know.

The Court: It is not inadmissible for those reasons because where there is no inquiry the party may offer it for whatever it may be admissible for. The court will only consider the part that is admissible, so if you want to make your objections now to the part that you think is inadmissible it may be ruled on.

Mr. Rader: If it please the court, what it consists of is a letter from our electrical superintendent to the National Fire Protection Association and a reply, both in 1954, in which the opinion of one Merwin Brandon was expressed. I don't consider it competent and I certainly wish he were in the courtroom and we would cross-examine him on it.

The Court: You mean it consists only of a matter of opinion?

Mr. Rader: Actually it does. I have the letter here if your Honor wishes to read it. It says, "On that basis, I am expressing my personal understanding of the situation and the Code intent in the hope that it will be helpful. If for any reason you

find that a formal interpretation is necessary or desirable, one could later be requested in line with the Interpretation Procedure in the Appendix to the National Electrical Code." All we have here is a personal opinion of somebody who is maybe more than a clerk and maybe not, I don't know.

Mr. Reischling: May I be heard on that, your Honor? [75]

The Court: Yes, you may point out what you think is admissible.

Mr. Reischling: If the court please——

Mr. Hellenthal: Your Honor, let me first interrupt. I may be wrong in my basic interpretation of the rule as regards to the production of documents, but I think that the rule exists so that certain documents can be obtained, studied, considered by counsel in the case and then used if admissible. I certainly, when I made this Notice to Produce, didn't make any attempt to get something into the record of this case.

The Court: Why didn't you say so when the matter was first mentioned? Of course, that is true. It is true that you can demand production of documents or papers that you don't have any intention of introducing because it may lead to something else, but here in view of the statement of counsel I thought that it was a question as to whether or not it would be admissible.

Mr. Hellenthal: That, your Honor, is why I have always asked that these papers be marked for identification. I have never seen these.

The Court: There is no need in marking them for identification if all you want to do is look at them.

Mr. Hellenthal: I just want to look at it. That is all I want to do. Now, in connection with paragraph 4, the replies to the letter of July 17, do you have them? Do you have the replies to the letter of July 17, Mr. Rader? [76]

Mr. Rader: Replies?

Mr. Hellenthal: Do you have the reply or replies?

Mr. Rader: Why don't you look at what I gave you and see if you have what you want?

Mr. Hellenthal: Do you have the reply or replies there to that I asked for in my Notice?

Mr. Rader: I don't know what he asked for in his Notice. I gave him what he asked for. I gave it to him. I don't know whether he has it or not. If you want something more I will get it.

Mr. Hellenthal: Is there further correspondence?

Mr. Rader: To my knowledge there is not.

Mr. Hellenthal: I have here—let me see what I have here—I am trying to hurry it up, but I guess I am going to have to see——

The Court: Well, if you don't want to introduce them in evidence you can examine them at your leisure. You don't need to examine them on the time of the court.

Mr. Hellenthal: Now, Mr. Rader, do you have any additional correspondence other than this in connection with the problem raised by Mr. McKinley in his letter of July 17 addressed to the National Fire Protection Association?

Mr. Rader: If it please the court, there are 15 files over there of correspondence of the National Fire Protection Association concerning electricity and hook-ons and everything else. This is the letter that he requested, our request to them [77] for a certain statement and their answer to us. Now, I don't know what those files may contain beyond that.

The Court: You mean you are enlarging the demand now?

Mr. Hellenthal: No, I am not, your Honor.

Mr. Rader: No, his demand is so large that in a matter of 14 hours it is impossible. If we went through all the correspondence and files we may find some more. We are going to keep looking if there is anything else in there, but at this time I don't know.

The Court: You mean now you are discussing that part of paragraph 4 that relates to additional correspondence?

Mr. Rader: Yes.

The Court: Well, that is too indefinite. We will just ignore that. Let's go to the next one.

Mr. Hellenthal: The bond requested in paragraph 5, bond or bonds if they are available.

Mr. Rader: I have bonds here.

Mr. Hellenthal: May I have them?

Mr. Rader: Before I give away City bonds which are a part of our file, I'd like to ask counsel if their own records don't show the bonds that they gave to the City? Then they should show them. I don't know why we should have to pull out original files

of their bonds and haul them around. If they don't have those in their own files they can use ours, I guess, but I'd like to ask them, before they ask me to produce, whether or not they have gone [78] through their own files to find out whether or not they have the copies.

Mr. Hellenthal: We have copies and drafts of them. We don't know what original form was produced. Will you stipulate that one bond was required of the corporations, the two corporations?

Mr. Rader: No, I think there are several bonds.

Mr. Hellenthal: Now, I have no objection, your Honor, if their bonds stayed lodged with the Clerk of the Court so that we can, with permission, examine them at reasonable hours. I don't want to burn them up. I don't want to have the responsibility of losing them.

Mr. Reischling: If the court please, of course, at any time an exhibit may be withdrawn with the consent of the court. If it becomes necessary in the trial of this case so that the court may have the benefit, and we can put it in the record, these bonds could be introduced, but I will have no objection to the City withdrawing the bonds after this case is over if the City so desires.

The Court: Well, is there Notice to Produce under Rule 34?

Mr. Hellenthal: It is under the Territorial Rules, the Uniform Rules of District Courts.

The Court: I am referring to the Federal Rules now.

Mr. Hellenthal: It is in the language of—both are uniform rules of the District Courts and the Federal Rules and I [79] don't know the number, your Honor. I can't remember it.

The Court: Well, it is 34. I think that you should show how they are material, necessary to your defense. That is one of the requirements and I notice that it is over that aspect of this demand that so much dispute developes. Now, for instance, why is it necessary for you to have this bond?

Mr. Hellenthal: I will explain our theory. The City takes the theory that the corporation plaintiffs, the two corporation plaintiffs are not customers, but that the buildings are customers. To be consistent the City should require one bond from each building, but they don't do that. There is one bond per plaintiff and we think that is decidedly material.

The Court: All you need to do then is to ask if that is the situation without producing the bonds.

Mr. Hellenthal: We might get into the situation they didn't have time to look through voluminous records. We want to give them the time to look into these things.

The Court: It certainly wouldn't require any more time to admit whatever the fact is in that respect than look for the bond itself.

Mr. Rader: If that is what they want we will admit that each corporation has up a bond to cover utility obligations in the City of Anchorage.

The Court: I think that is sufficient.

Mr. Rader: Here are additional bonds. [80]

Mr. Hellenthal: Your Honor, can I pass to the next? We are checking the bonds now to see what stipulation will cover it.

The Court: You may pass to the next one.

Mr. Hellenthal: The minutes of the council meeting of November 9, 1951.

Mr. Rader: I will stipulate they can be offered in evidence.

Mr. Hellenthal: I think we better be consistent on this.

Mr. Rader: If you want to introduce them you can call a witness.

The Court: Well, I am waiting to hear whether there is any agreement here as to this last item.

Mr. Hellenthal: I can't so stipulate until I see them.

The Court: We will recess at this time for 10 minutes.

(Whereupon, at 3:11 o'clock p.m., following a 10-minutes recess, court reconvenes and the following proceedings were had.)

Mr. Hellenthal: Now we have the minutes of the council meeting. Do you have the tape recording of the proceedings?

Mr. Rader: We don't. At least not to our knowledge we don't have it. Now, we have a lot of tapes over there and I will admit the procedure, your Honor, is generally at the council meetings there is a tape recorder that is on most of the time, not all of the time. The City Clerk generally uses it to check [81] his minutes later on to make sure that

his notes agree with the tape. We have a number of tapes and since yesterday afternoon—those tapes are sometimes hard to determine what is on a tape because you have to put it on the machine, unless they are indexed properly, and go all the way through—so at this time we don't have a tape. We don't know of a tape. There may be one. If there is we will produce it.

Mr. Hellenthal: That is satisfactory.

The Court: Do you want the minutes introduced in evidence?

Mr. Hellenthal: I will have to read them first. I haven't had a chance to read them.

Mr. Rader: They are certified as correct by the City Clerk.

Mr. Hellenthal: They may be introduced in evidence. May I have a copy?

Mr. Rader: Yes.

The Court: They will be admitted as Defendant's Exhibit K.

Mr. Reischling: If the court please, I will ask that the letter of July 19, 1954, addressed to the National Fire Protection Association of Boston, Massachusetts, and signed by William H. McKinley, Superintendent of the Electrical Department, together with the reply to that letter, dated July 27, 1954, addressed to Mr. McKinley, Superintendent of the Anchorage Electrical [82] Department and signed by Merwin Brandon, the man to whom the first letter was addressed, be marked as Exhibit L for identification. This is the letter, the series of letters that counsel conceded we had the right to

have marked for identification and about which some question may later arise as to the admissibility of certain portions of it.

The Court: Then, as I understand it, you concede that a part of this letter is admissible?

Mr. Rader: I don't concede that any part of it is admissible.

The Court: Then you better object now. I mean, if it is going—if you are going to object to the admissibility of whether it is offered in evidence I think we might have the objection now because it is preferable on pre-trial conferences not to merely mark documents for identification, but have them admitted as exhibits. So if you take the position now that no part is admissible, I think we ought to thrash that out here and now.

Mr. Rader: I have no objection. If they want to use the letter from Mr. McKinley for impeachment in his examination they can use it, but he is in court and will be in court so I concede it serves no purpose and is not and should not be a part of the record. As to the reply, it is a reply from someone, I think in Boston, Massachusetts, as to a technical matter and I object to that on the ground it is completely hearsay.

The Court: Will you state the purpose for which you [83] think it should be admitted?

Mr. Reischling: Yes, your Honor. The evidence in this case will disclose the fact that the City at one time took the position, as an excuse for refusing to give us combined billing, that there was something in the National Electrical Code which required

we have a single meter and with single meters we could not have combined billing.

The Court: Could not have what?

Mr. Reischling: Combined billing of all of the meters that serve, we will say, Panoramic View Corporation, that is, all of the power used by the corporation and in a corporate capacity could not be charged to us as one customer, but that they would have to charge it to us as though we were 14 separate individual owners. The rules and regulations of the City of Anchorage which the City contended supported that position are to be interpreted any way you want to look at them, are ambiguous, that is, perhaps at least they did not support the City's position. The City, therefore——

The Court: You are referring now to the letter as being ambiguous?

Mr. Reischling: Yes. The City, therefore, in an effort to solve that ambiguity wrote to this particular expert organization for interpretation of those particular sections of the National Electrical Code which they contended supported their position. The letter, copy of which was produced by counsel [84] today, together with the answer to that letter is a direct refusal on the part of these particular experts to concede or to admit that the National Electrical Code had anything whatsoever to do with this particular problem. In other words, the City itself sought to solve or to get support for the position which they took. It is interdepartmental communication. Knowledge of the City, I think, can be used and is admissible to show that the City actually has

no reasonable basis upon which to take the position it insists upon taking, and this letter shows that the National Electrical Code or Safety Code upon which they have based, in part at least, their refusal to give us proper billing does not say what the City contends that it does say. I believe that under the circumstances that that information and that opinion, which the City itself sought in aid of its own case, is relevant here to aid the court in seeing and knowing the City's state of mind at that time and since that time.

The Court: But what isn't clear to me is, as I understand it, the City wrote seeking an interpretation of some part——

Mr. Reischling: Of the National Electrical Safety Code.

The Court: What kind of advice did they get?

Mr. Reischling: They got the reply that is attached to that exhibit. It had nothing whatsoever to do with the particular position that they took, that is, they said it was a matter for the local administrative or electrical authorities to determine, but the opinion is not helpful to them and I believe, under the [85] circumstances, it is admissible.

The Court: Well, but it is admissible for what purpose? You mentioned to show the position of the City or the attitude of the City at one time, but the position of the City or the attitude at one time isn't necessarily relevant or competent unless it is connected up with some other evidence.

Mr. Reischling: We can connect it, your Honor.

The Court: How?

Mr. Reischling: Through their witnesses at the time their witnesses are called.

Mr. Hellenthal: To put it in a nutshell, your Honor, the request that plaintiffs made was denied by the City for the very simple reason that the National Electrical Safety Code, which is an ordinance of the City, prohibits the granting of this request. The City finally was induced to write a letter, as they always do in questions of code interpretation, to see if that was true or false and the answer came back. The code has nothing to do with it and they wrote to the people that make the codes.

The Court: Well, I understand now and all it means is that the City was mistaken in its position at that time.

Mr. Hellenthal: That is very material.

The Court: Why is it material?

Mr. Hellenthal: Because they never rectified their mistake.

The Court: But they never admitted the mistake. For [86] instance, here is the situation as has been explained to me, at least as I understand it: The City took a position for which it sought support and it failed to get that support. That doesn't mean that the City should recede from its position merely because they failed to get support somewhere.

Mr. Hellenthal: We are not asking the City to recede from its position, but we are going to prove that the City's position is 100 per cent wrong.

The Court: Well, then you can do it without this letter.

Mr. Hellenthal: I wonder.

The Court: This letter wouldn't show it, it seems to me.

Mr. Hellenthal: It certainly isn't conclusive, but it certainly tends to show it. Your Honor, may I for a moment digress? In modern cities a practice has grown up of adopting the National Codes. We have in Anchorage, for example, the Uniform Specific States Builders Code. The City also has the National Electrical Safety Code, the National Electric Appliance Code, they have the Uniform Plumbing Code and perhaps one other National Code. Off-hand I can't think of it. The plans for new buildings in the City of Anchorage are not approved by the Anchorage Building officials, but they are approved by an authority in Los Angeles which has that right pursuant to the provisions of the Uniform Specific States Builders Code. That is why the practice has grown up of consulting the code officials; irrespective of its legality or practicability that is what happens. In this instance they [87] wrote to the code authority in 1954 and the code authority said, "Your contention is not correct." Now, according to our theory of the case that was the contention that had been advanced by the City since 1951 and before as the reason for denying the privilege of combined billing to our client plaintiffs.

The Court: I understand all that, but if it merely amounts to this, as I said before, that the City failed

to get the support or, you might say, confirmation in its opinion from the National Board, now, that doesn't make it relevant evidence against the City. It just simply leaves the City where it was before it wrote the letter.

Mr. Reischling: If your Honor please, may I suggest that under the law governing the admission of expert testimony, this is the City's own expert. Now, after all, they asked for an opinion from an expert and it is true that it may only be an opinion and the weight of the opinion may be for the court, but that does not have any effect upon its admissibility.

The Court: How can it be an opinion when all it amounts to is a negative reply or a reply? We don't have anything to do with it. How can that be an opinion?

Mr. Reischling: It states, "In our opinion the National Safety Code does not apply."

The Court: What value is an opinion of that kind? Absolutely nothing.

Mr. Reischling: Well, it is—— [88]

The Court: It doesn't contain a bit of affirmative matter. It is just simply a negative proposition that has no evidentiary value whatever.

Mr. Rader: If it please the court, there has been a lot of innuendo here that the City was not supported by this opinion. This man is giving a personal opinion and saying if we want a formal opinion we can go ahead and get one. Now, they were well aware of this letter. There is no question about that. This has never been a secret. If they want a

formal opinion they can get one as to the result of this thing. The man is not here to cross-examine, consequently I don't like to put his opinion in evidence, but he does support the City and he does say that from a safety standpoint the fewer service connections to a building the better. Isn't that what you gentlemen were saying that they reversed?

Mr. Hellenthal: No, it isn't what we were saying.

Mr. Rader: I misunderstood.

Mr. Reischling: They say the National Safety Code has nothing to do with this problem.

The Court: As I say, it leaves the City and the problem right back where it was before the letter was written.

Mr. Reischling: We merely ask, if the Court please, at this time it only be marked for identification.

The Court: There is no use marking it for identification if it doesn't have any more probative value than that. Of course, it may be offered, but in the meantime it will not even be marked for [89] identification. Let's go on to the next item.

Mr. Hellenthal: Paragraph 7, the documents requested there, please. We don't want the court to get the impression the City has not co-operated with us. We have these documents and they are in copy form already and we want the originals.

The Court: Is there any reason for having the originals?

Mr. Hellenthal: Yes.

Mr. Rader: You better mark these separately. I have given first contract with Civil Aeronautics Administration and City of Anchorage.

The Court: Are you agreed that that may be offered in evidence?

Mr. Rader: Yes.

The Court: Well, it may be given the next number which will be L.

Mr. Rader: And a map document designated 8D-31-3E, Civil Aeronautics Administration. I do not admit that the document—it was not attached to the contract with C.A.A. C.A.A. had the only copy of it and they admit it had not been attached, although it is referred to in the contract.

The Court: Is that a plat or something?

Mr. Rader: Yes, it is a map.

Mr. Cottis: It is referred to in the contract as being attached.

The Court: Well, they may be marked as one exhibit, [90] Exhibit L.

Mr. Rader: Now, if it please the court, the balance of that paragraph in the Notice to Produce, "plus any other contracts entered into by the City of Anchorage for sale of electric energy." We have files over there which have contracts in them; most of them are government contracts.

The Court: Well, you need not discuss that. I have already held in connection with another item of this kind it has got to be specified. It is too indefinite. Well, I suppose that disposes now of—

Mr. Hellenthal: Your Honor, can't those files containing those contracts be made available to us for inspection at the City Hall?

Mr. Rader: Well, the only thing, we insist you not take them out of the files. We are billing all the time on them and we have a lot of old ones that are carefully filed and have attached memoranda. You are welcome though to dig through them. We don't want a dozen of you in; one or two of you can fit in that office without stopping things.

The Court: Is this a case where you are going to look for some particular contract or where any contract will do?

Mr. Hellenthal: Particular contracts, your Honor.

The Court: Well, if it was a case where any contract would do there would have to be proper demand, but not otherwise.

Mr. Cottis: If the court please, paragraph 5 of the [91] Notice to Produce was on the bond. Now, maybe Mr. Rader would agree to this stipulation: That originally one bond was furnished by Anchorage Rental Service, as agent for Richardson Vista Corporation and Panoramic View Corporation, covering these utility services to these projects.

Mr. Rader: 2nd of April, 1953. I don't think it is material.

Mr. Cottis: I don't think the dates are too important. As I understand it, originally one bond was put up for the two projects and one recently—two bonds—one for each of the two projects.

Mr. Rader: Just take the dates so there won't be a misunderstanding.

Mr. Cottis: I don't think we have it all the way back.

Mr. Rader: That is all I know of. There may be more, but those are the current bonds.

Mr. Cottis: Well, will counsel stipulate——

Mr. Hellenthal: Just a minute——

Mr. Cottis: March 4, 1952, that has been the situation and before that there was a cash bond up for the projects.

Mr. Rader: I will stipulate that each corporation put up a bond of either cash or qualified surety for payment of their electrical utility bills. Is that enough?

Mr. Cottis: And only one bond?

Mr. Rader: No, there are two bonds. [92]

Mr. Cottis: Originally just the one.

Mr. Rader: Originally they consolidated and both Richardson Vista and Panoramic were on the same bond. Subsequently and in recent years they have——beginning with 1954 they put up individual bonds.

Mr. Cottis: That is two bonds; one covering each of the projects.

The Court: You say those two were put up in 1954?

Mr. Rader: Yes, one for each project. Prior to this they had been put up jointly.

Mr. Cottis: Prior to that one bond had covered both projects.

Mr. Hellenthal: Is that correct?

Mr. Rader: Yes, I think so.

The Court: Well, is there any other matter, question or issue on which the parties can agree?

Mr. Hellenthal: Now, at this conference—I think

we are holding up the matter on the letters, the monthly letters of protest. Mr. Rader, can we agree that the first written protest was delivered to the City early in November, 1951, read at the council meeting of November 9, 1951, and get the letter that I gave to you in evidence? Do you have the original of the letter of protest?

Mr. Rader: I handed it to you a few minutes ago.

Mr. Hellenthal: Perhaps it was put in. I don't recall [93] it, though.

Mr. Rader: I gave it to you.

Mr. Hellenthal: Is that the one with the attachment? I withdraw that. It is in the record as an exhibit.

Mr. Cottis: Plaintiff's Exhibit 1 for identification only.

Mr. Rader: Now, if your Honor wishes to hear objection I will make my objection on that also.

The Court: What is that exhibit?

Mr. Rader: Plaintiff's Exhibit No. 1 for identification. I assume if we put it in for identification we reserve our objections to the time they are introduced.

The Court: What is that letter?

Mr. Rader: The letter is a protest and has attached to it a yellow sheet of paper which purportedly represents a certain situation in the States.

The Court: You want to object to it on what grounds?

Mr. Rader: I object to the attached purported wire for the fact it is absolutely hearsay and I have

definite knowledge the contrary is true. The wire does not state the fact. The letter may be introduced as being an official document delivered to the City Council.

The Court: Do counsel have anything to say as to the remarks of counsel for the defendant as to the admissibility of the copy of the telegram? [94]

Mr. Cottis: Yes, your Honor, it is part of the letter. It is referred to in the letter and in effect incorporated into the letter by reference.

Mr. Rader: I will stipulate that the letter with that attached yellow sheet was given to the persons named. I think it was addressed to the City Council.

The Court: Where in the letter is that referred to?

Mr. Cottis: I'd have to look at it, your Honor.

The Court: Well, I can.

Mr. Rader: I believe it is referred to all right. I certainly don't admit the facts stated in that wire though.

The Court: Well, I think the objection is well taken. The fact it is referred to in the letter doesn't make it admissible.

Mr. Cottis: It is part of the letter and we are offering it, not for its contents, but for the document itself. In other words, the City had that before it as the original protest and made no further move to investigate it, just arbitrarily turned it down.

The Court: But the protest is sufficient in itself. If it is merely a protest it doesn't have to be supported by anything of that kind.

Mr. Cottis: But, your Honor, as was stated about

other exhibits, the court wouldn't give unjustified weight to the attachment. I would simply think that the entire document should be admitted then the portions that are relevant, even if they are [95] the first and third sentences, would be the ones that would be considered.

The Court: It seems to me the only purpose for admitting anything of that kind would show there was protest and what argument would be made in support of the protest is immaterial. That is all this is. That is all the telegram is. If this letter isn't offered for any other purpose than to show there was protest lodged with the City, why, the telegram is inadmissible. It doesn't serve any purpose. This letter will be admitted for the purpose of showing that a protest was made and not for the purpose of showing the truth of any of the statements made therein.

Mr. Cottis: And may the attachment to the letter be marked for identification, your Honor?

The Court: Well, what good will that do?

Mr. Rader: I object to that. It is not the best evidence. I'd like to see them produce the wire.

Mr. Hellenthal: I have the wire.

The Court: I have already sustained the objection to it.

Mr. Hellenthal: Well, your Honor, as a purely academic matter it is, frankly, a difference of opinion on this matter. Some men whose opinion I respect say the letter should—the wire should accompany the letter. I am inclined——

The Court: I don't think there is any authority of that kind and besides I am passing on this, not somebody else.

Mr. Hellenthal: However, your Honor, just for the sake [96] of the record let us assume that in some aspect of this case we did not prevail and an appeal were necessary. I think we should show in the record what matters were offered even though I agree with your Honor, but all lawyers don't think that appendix might not be relevant.

The Court: I have ruled on it. If you want to offer it in connection with an offer of proof, why, you may do so, but it is not going to be a part of the exhibit.

Mr. Hellenthal: Now perhaps Mr. Rader has something he can think of that would expedite the trial of the factual matters. Now, the situation, as I see it, your Honor, is that we have reached some sort of a, using the proposed stipulation as a guide—we have covered everything as far as I see it. The only paragraphs that no stipulation has been obtained are paragraphs 6 and 14. Now perhaps if Mr. Rader has something that will expedite it we can do that, otherwise, we are ready to close.

The Court: When you refer to paragraphs 6 and 14 you refer to the proposed stipulation?

Mr. Hellenthal: We agreed at our Monday morning conference there was nothing we could stipulate to as to that. The only things remaining are 6 and 14. That is merely for the court's information.

The Court: You are referring to paragraphs 6 and 14 of the complaint?

Mr. Hellenthal: Yes. No stipulation can be made

there [97] so far as I am concerned, at the pre-trial conference. I have done what I want to do.

Mr. Rader: I have nothing, your Honor. I assume that after they close this case I will have, perhaps, additional documents, but we can take those up at that time.

The Court: Well, if you have any evidence to produce, why, now is the time to go ahead with it.

Mr. Hellenthal: Any what?

The Court: Evidence. Are you ready to rest, or are you——

Mr. Hellenthal: No, I suggest we get some opening statements in here somewhere.

The Court: If you feel that an opening statement should be made you may do so, although it seems to me with all the discussion I have a pretty good idea of what it is about, but you may make your opening statement.

(Whereupon, opening statement was made by Mr. Hellenthal, of counsel for the plaintiffs.)

(Whereupon, opening statement was made by Mr. Reischling, of counsel for the plaintiff, Panoramic View Corporation.)

(Whereupon, opening statement was made by Mr. Rader, of counsel for the defendant.)

The Court: Well, we will adjourn then to resume this [98] case at 10:00 o'clock tomorrow morning.

(Whereupon, at 4:54 o'clock p.m., the court continues the cause to 10:00 o'clock a.m., Friday, March 25, 1955.) [99]

The Court: You may proceed with your case.

Mr. Hellenthal: Your Honor, at this time the City is prepared to stipulate with regard to the matters that were held over yesterday as to protested payments. Both parties agree that the first payment of utility billings for Panoramic View Corporation and Richardson Vista Corporation was made under protest by Lela Hall as managing agent for the two corporations d/b/a under the name of Anchorage Rental Service and that each payment was protested by means of a formal letter of protest each month thereafter until May, 1954, after which such date Panoramic View Corporation protested in exactly the same manner by means of monthly formal letters up until the present day through its managing agent, Mr. St. Amor, and Mr. Winn prior to him. And that plaintiff Richardson Vista Corporation following May, 1954, made the identical protest monthly in formal fashion through its agent, Mr. Harland, and further that the protest letter—the form used monthly read as follows——

The Court: Well, if you agree they protested what difference does it make what form the protest was made?

Mr. Rader: If it please the court, like so many other times here the stipulation, so far as I am concerned, is misunderstood. I am willing to stipulate that we take one of these typical letters and put it in evidence as an exhibit and stipulate that similar letters were received by the City of Anchorage every month from both [101] of the corporations and that it was continuing, but I am not stipulating it was continuing protest as to necessarily the matters which may be tried in this lawsuit.

The Court: Do either of you contend that the form of protest makes any difference?

Mr. Rader: I think it does. There is a difference between protesting one thing and another thing.

The Court: All we are concerned with here is protest in payment.

Mr. Rader: Well, but there has to be a reason for the protest.

The Court: You mean that this particular matter involves the legal sufficiency of the protest?

Mr. Rader: It may very well involve the legal sufficiency of the protest. That is the reason I agreed to stipulate to the fact that they were received and that is all.

The Court: By the way, what is the significance of May, 1954?

Mr. Hellenthal: Merely this: That Mrs. Hall then went to Seattle to other work and she was replaced by her successor, Mr. Quinn of Panoramic View, and Mr. Harlon for Richardson Vista. That is the only significance—no legal significance.

The Court: Well, I thought that since it was said that after that date the plaintiffs acted separately instead of by one agent that something had occurred. [102]

Mr. Hellenthal: There was a separate agent for each plaintiff after May of 1954.

The Court: I see. Well, then have the parties agreed in accordance with the statement of counsel for the defense?

Mr. Hellenthal: Yes. I would like to introduce a typical protest.

Mr. Rader: If it please the court, I don't believe this is a typical protest. You can introduce that one also, if you wish.

Mr. Hellenthal: All right, fine. The City receipted for each of these protests. Your Honor, I am kind of at a loss here because each time a letter of protest was delivered the City Clerk signed on the duplicate copy with the date on it, the original, of course, he kept, and I don't want to impose on the court but I submit these are——

Mr. Rader: These two may be combined and marked as one exhibit, Plaintiff's Exhibit No. 2, as being typical protest letter.

The Court: Well, now, maybe we ought to make certain that we have this stipulation in the record as modified. It is to the effect, as I understand it, that each protest was substantially in the form of the exhibit.

Mr. Rader: That is my understanding.

The Court: And that the protests made were in that form with every payment.

Mr. Rader: Yes. [103]

The Court: Very well.

Mr. Rader: If it please the court, because of the fact there are two plaintiffs here and lots of stipulating has been done I believe without a formal agreement of both the plaintiffs, I assume that the practicing procedure in here will be that the plaintiffs will be bound jointly unless one or the other objects to them being bound jointly.

The Court: Of course, that is true of law. If one

sits by he is deemed to acquiesce if he doesn't raise objection to it.

Mr. Rader: So long as that is understood.

Mr. Hellenthal: We should like this paper marked and offered in evidence pursuant to stipulation of the parties.

Mr. Rader: If it please the court, I suppose maybe 5 seconds ago I told Mr. Hellenthal I did not agree to it being offered in evidence. I do not consider it material. I admit its authenticity, but I do not admit its materiality to these proceedings.

Mr. Cottis: Your Honor, its materiality is that it shows that the two establishments with which we are concerned with here—it shows their relationship to the City, it shows the fact that they are more or less isolated from other buildings, that they are not just stores along a street in Anchorage, but that they have their own layout. This offered exhibit is a map compiled from aerial photographs and it shows the actual shape of [104] the buildings, their relation to each other, their relation to roads, railroads to the city business section, and I can't help but think it would be helpful to the court.

The Court: Well, it isn't apparent to me how it could be material; how these facts that you refer to could be material.

Mr. Reischling: If the court please, may I be heard on that?

The Court: Very well.

Mr. Reischling: This plan is illustrative only of the situation that exists in Anchorage, Alaska. Assuming that this case might go somewhere else, it is

necessary for whoever might be reviewing this case to have a realization of what the **geographical aspect** for—all it is for is to illustrate the exact situation as it is shown on that map.

The Court: I just can't see how illustrating a situation of this kind can possibly have any bearing on the issues here.

Mr. Reischling: Because of the law on the case that provides that certain classifications of a user of services may be based upon various factors and to show the similarity of the situation that exists here with reference to the length of the transmission lines; its distance from the power houses and so forth. That is relevant, and material, and competent to show the situation as it exists here in the City of Anchorage.

The Court: Do you dispute that?

Mr. Rader: Well, it is not my understanding of the law, [105] but there may be some law to that effect. I don't think it has any materiality, but it may have if counsel can connect it up.

The Court: Well, I would exclude it over the objection, but since counsel intimates that since it will become pertinent in view of the law that governs this case, it may be admitted for illustrative purposes. That will be Exhibit what?

The Clerk: Plaintiff's Exhibit 3.

Mr. Hellenthal: May the letters that were with the last exhibit, 2, be read at any time during the proceedings?

The Court: Well, if it becomes necessary to read them, but since they're in evidence, the court will read them at some time or other.

Mr. Hellenthal: Perhaps we should read them now.

The Court: For what purpose?

Mr. Hellenthal: Well, it will be proper for counsel to read them at any time hereafter.

The Court: If it becomes pertinent to have them read, yes, but I can't see any reason for reading the exhibits now.

Mr. Hellenthal: Mrs. Lela Hall, please.

LELA HALL

called as a witness for and on behalf of the plaintiff, and, being first duly sworn, testifies as follows on

Direct Examination

By Mr. Hellenthal: [106]

Q. Mrs. Hall, will you please state your full name? A. My name is Lela Mae Hall.

Q. Where do you reside at the present time, Mrs. Hall? A. I reside in Seattle, Washington.

Q. Mrs. Hall, will you tell the court what connection you have had and do have, if any, with the plaintiffs in this proceeding, Panoramic View Corporation and Richardson Vista Corporation?

A. On March 15, 1951, I was hired as management agent by the two corporations to leave Seattle and come to Anchorage to open the projects.

Q. What were your duties in connection with opening the projects first?

A. I prepared budget analysis, set up operating

(Testimony of Lela Hall.)

schedule, developed leases, contracts, and was management agent and representative in the community for the corporations.

Q. What were your functions in connection with the management of the projects?

A. Hired and fired crews, developed leases—lease department, executed all contracts necessary for the corporations with all agencies in the community.

Q. When did you assume your duties, Mrs. Hall?

A. I arrived in Anchorage in April, 1951.

Q. And you had been employed, if I understand you correctly, since March of 1951 engaged in preliminary work in Seattle? [107] A. Yes, sir.

Q. Do you now have any connection with plaintiff, Panoramic View Corporation, and plaintiff, Richardson Vista Corporation?

A. No, sir. I resigned in April of 1954.

Q. Your connections with the corporations ended at that time? A. Yes, sir.

Q. Now, Mrs. Hall, will you describe briefly the project, Richardson Vista Corporation?

A. Richardson Vista has 19 buildings, 22 units to a building on one site development on land lease from Fort Richardson originally.

Mr. Rader: We have stipulated to all that.

The Court: Yes, you have stipulated to all that.

Q. (By Mr. Hellenthal): And how are the buildings located?

Mr. Rader: We stipulated it is on the map.

Q. (By Mr. Hellenthal): Can you tell us, Mrs. Hall, why the buildings are located as they are?

(Testimony of Lela Hall.)

A. The project was financed under F.H.A. and in order to finance the project, there are requirements of F.H.A. on density and the buildings were laid out on a garden court type apartments.

Mr. Rader: If it please the court, without showing that she was involved in the laying out and was present when the buildings were laid out on the drafting board—she apparently came [108] here in April of 1951 and when the buildings were under construction. I think she is speaking of something which she has no knowledge, without a proper foundation; why perhaps foundation can be laid. I don't know, but it hasn't been laid yet.

The Court: It seems to me that since there is already evidence in the case that shows the layout that you can draw any inference you want to from those exhibits and argue these matters that you are now asking here to testify about.

Q. (By Mr. Hellenthal): All I want to know is why were the buildings laid out the way they are, if you know?

A. Density requirements on the part of F.H.A. I had the opportunity of reviewing the Home Loan applications and was thoroughly familiar with the architect sketches and full proposal of plan operation.

Q. Do you know why the buildings were limited to two stories in height?

A. Yes. The height requirement was because it was on a Base lease. The Fort Richardson original lease would not permit an extension of over two-story buildings.

(Testimony of Lela Hall.)

Q. With recreational areas provided in the arrangement of the buildings. That is part of the plan? A. Yes, they are.

Q. To what extent?

A. They were centralized and decentralized since the project [109] was developed to house families with children.

Q. And hence areas were provided in the acreage for recreation for the children?

A. That is correct.

Q. Lawns? A. Yes, sir.

Q. Was it the proximity to the runways of Elmendorf Air Force Base that influenced the height?

A. That is the reason. In the provisions of the lease we were not permitted to build above two stories for safety factors.

Q. Now, Mrs. Hall, did you have contact with the City officials with regard to the electrical installation, at first Panoramic View Corporation; second, Richardson Vista Corporation?

A. Well, in preparation for occupancy, there are many, many contacts on all phases of necessary utilities. During this time, shortly after arrival, I had a conference with Mr. Robert Sharp, then City Manager. I was preparing a budget analysis and I asked for estimates, so I discussed with him the proposed utility costs and at that time I was told that we would be treated as one establishment. I refreshed my recollection by going back through the minutes and notes that I had referred in the minutes of the corporation, the word "establishment" was used.

(Testimony of Lela Hall.)

Q. When was that conversation, to the best of your recollection?

A. It was in the early part of August. [110]

Q. Of what year? A. 1951.

Q. Did you have subsequent conversations with the City officials with regard to the matter of the electrical installations of the two projects?

A. Yes, we were in constant contact and on the first receipted billing which came through in September, we received individual billings for each building. I took these billings back down to Mr. Pendergras, who was then the City Treasurer, and Mr. Pendergras stated Mr. Sharp was out of town. I assumed that an error had been made. I asked him for a corrected billing. There were also arithmetical errors. He said I would have to wait for Mr. Sharp to return to town. In the meantime I talked to Mr. Mason Lazelle. Mr. Lazelle told me I would not be permitted to have a single billing because the National Electrical Code would not permit me to have single billings where I had individual meters. Then——

The Court: All this has been stipulated, hasn't it?

Mr. Hellenthal: I don't think so, your Honor.

The Court: Well, but it is admitted here. Upon what basis, or upon what theory, the City has made its charges and so all the efforts of the plaintiff to have some different system put into force, or method of billing, is just immaterial.

Mr. Hellenthal: Your Honor, we did not admit

(Testimony of Lela Hall.)

the basis on which the City computed their [111] charges.

The Court: Of course I understand that, but I just can't see how it would contribute here in any respect whatever to go into the details of the conversations or discussions and protests that were made in those days.

Mr. Hellenthal: I think, your Honor, that on the theory of the case, the second theory of the case that I enumerated in the opening statement yesterday that we can tie this up and show its pertinency and relevancy to the issues presented here.

The Court: I think you would have to show it now because for lack of time I would have to exclude it. I think you will have to show the pertinency now.

Mr. Hellenthal: Yes, sir. It is very simply: plaintiffs relied on the original interpretation of the City ordinances as furnished them by the City officials in their reports to their detriment. That is the theory for the testimony that we seek to offer.

The Court: I don't suppose the City is disputing what they relied on, is it?

Mr. Rader: It is hard for me to know what they relied on.

The Court: It is? You take the position that regardless of what they relied on, the City had a certain policy or method of billing in situations of this kind and merely adhered to that system or method?

Mr. Rader: That is our position.

(Testimony of Lela Hall.)

The Court: What the plaintiff relied on would appear to [112] be immaterial.

Mr. Hellenthal: What was that?

Mr. Rader: Pardon——

Mr. Hellenthal: What was their set policy that the City had? We are trying to show it. We tried to find out what it was.

Mr. Rader: Set policy is that we don't combine meter readings and we don't permit people to bill on a distribution system within the City of Anchorage.

Mr. Hellenthal: Of course we take issue with that. We were told otherwise.

The Court: But even if you were told otherwise, I can't see how it would be material here. For instance, you could call a City official here who was charged with the duty of determining these things or knew of them and ask him what the method or system of the City was at that time, or the basis for their billing practices, but I can't see how it would be of any assistance to the court to have all these preliminary matters—the efforts of the plaintiffs to one or another system invoked here or what was said at these discussions.

Mr. Rader: If it please the court, if you want to call a three-minute recess, I have an A.L.R. citation which goes to the section. There is no estoppel to the bill itself. Let's assume they represented to them and they bill on that basis. The issue is not whether or not we should have represented to them or whether or not we should have billed to them. If we offered them a [113] discriminatory rate, it

(Testimony of Lela Hall.)

would be illegal. We could cancel that contract today. The point is, there is no estoppel against the City in this respect because of an illegal contract. If you want to call a five-minute recess, I will produce the law on that.

The Court: Well, I'm inclined to take the doctrine of estoppel to apply to sovereign or political subdivisions.

Mr. Rader: That is *res gestae*. The question is whether or not it is discrimination and an estoppel and reliance.

Mr. Reischling: Without regard to estoppel here I don't believe the court is holding that a man cloaked with the authority that Mr. Sharp apparently was cloaked with and is cloaked with by statute and by the regulations of the City of Anchorage concerning the making of contracts for the service to consumers of electrical power and other utilities cannot be held to have bound the City. Now, I have submitted to your Honor authorities in which Supreme Courts of various other judiciaries have so held and if the court feels that without regard to the doctrine of estoppel that when a consumer and citizen of the city and a user of the service has no protection when he is dealing with the municipality merely because it is a municipality, then, of course, we have no case. If the court can in effect this morning rule, and I want to point out that no objection was made to this testimony, there was no objection of any kind at all, but if the court rules that we cannot show, and have no power to show the apparent authority with which Mr. Sharp was

(Testimony of Lela Hall.)

cloaked and his apparent authority to deal with representatives [114] of other consumers of power, then, of course, we cannot show any contract. But I submit, your Honor, that that is not the law.

Mr. Rader: If it please the court, let's assume that Mr. Sharp had told her they would give her power for nothing; they would give these plaintiffs power for nothing if they would build their factories here; build their housing project here, would that be binding on the City of Anchorage because Mr. Sharp did that? That would be the most illegal and unjust discrimination that anybody could have done. Anybody in Anchorage could come in and say, "You are discriminating against me because you are giving them free power." Now, the same principle applies when we give them a special—a preferential rate by combining meter readings. As I say, in five minutes I will submit authorities to your Honor, if you want to call a five-minute recess. I will submit a case which is to this effect that the city councils or city representatives for utilities company representatives have induced industries and establishments to be built in a certain location in a certain town and that thousands of dollars have been expended on that representation. If the court still holds that despite that representation, despite that contract, if the contract itself is discriminatory in favor of anyone more than one—a preferential rate in favor of one person, the Public Utility District Commission in the state can set it aside or the city council which has jurisdiction over regulations of utilities within its jurisdiction, within its limits, can

(Testimony of Lela Hall.)

also set it aside because it is an illegal contract. The whole [115] point is that if such a contract was made it is illegal unless there was a valid basis for it. Therefore, the agreements can have absolutely no bearing on the present lawsuit. Actually I don't think the testimony is going to hurt us very much if it does come out, but I think we will waste a lot of time. We are hasseling about who said what in the City.

The Court: That was the purpose of my raising the point as to the materiality of this evidence. Now, as I understand your position in stating your position as you did a few minutes ago, you base it, I suppose, on the difference between proprietary and governmental functions.

Mr. Reischling: Yes, your Honor, and further, your Honor, there is nothing in this case, but I agree with counsel with respect to giving away power.

The Court: Well, I suppose——

Mr. Reischling: This is not the same thing at all.

The Court: Suppose that counsel didn't go as far as he did in citing an illustration of that kind, which of course would be clearly beyond the apparent scope of any municipal office of authority, but suppose it was within the apparent scope of the officer's authority, then, is it your position the City is bound by that?

Mr. Reischling: If it is within the apparent scope of the man's authority, if the counsel has

(Testimony of Lela Hall.)

cloaked him with that apparent authority and a person relies on it as the plaintiffs did [116] in this particular case, having all the reason in the world to rely on it because he dealt with everyone else, and inasmuch as we are paying equal, if not greater rates, for power than anybody else, I believe that the contract was made, which the City has obtained the full benefits from and I think, and they did not live up to it. In fact, they have forced us, under the threat of turning off power, to pay them our own money without interest. In other words, it is almost like a bonus for getting power that other persons similarly situated to us did not have to pay, and that in the essence is the legal question. We can use verbiage and language to clothe this thing and have an obscured identity, but it boils down to one very simple problem, and that is, are we in the classification in which we are entitled to this particular rate and we look at the published rate of the City to determine that. And I submit to your Honor that there is nothing in that published rate which any consumer or customer could see that would lead him to believe that he could not rely upon his own agency. Is it the public—the City itself that makes that representation to him? Have we not the right to expect from our own City the type of integrity and the moral uprightness that we expect of our fellowmen. The people that are in that office, if we cannot rely upon what they tell us when we have their own published rate before us—that is what our problem is.

(Testimony of Lela Hall.)

The Court: Well, but you speak now of the question being one of classification. We will assume that that is so. How can [117] any discussion itself—preliminary discussion throw any light upon whether the classification is proper. As a matter of fact, when you speak of proper classification, then it assumes that any statement of the kind that has been referred to here, made by one of the City officers, would certainly not be binding if it didn't happen to be the proper classification. So, while I will agree with the proposition that the City is bound somewhat like a private litigant in certain matters, I am wondering whether the City would be bound in matters of fixing rates just because somebody in the City Hall had an idea that turned out to be incorrect.

Mr. Cottis: Your Honor, could I be heard briefly? I don't want to belabor the thing. It isn't a question of fixing rates or classifying. It's a question of the application of the published rate schedule and that schedule "C" that was in effect in 1951 provides for commercial electrical consumption in establishments not having more than single phase service, not having larger voltage motors than five horsepower and that sort of thing. What we are trying to show by this witness is that the City, along in the spring, said, "Yes, that schedule applies to you. You are one establishment. You will be billed for your house consumption as one establishment." And then a few months later, when the first bill

(Testimony of Lela Hall.)

comes through, it is no longer so. Now, we will connect up that testimony to show that if at the original conversation, the City had said, "No, you are not one establishment. You are 20 establishments or 19 establishments." Then, the consumer—the [118] plaintiffs here would have gone to the extent necessary to provide a single entry for its house current and the City, on being offered a single point of entry, would have had to bill them on one combined consumption schedule. Now, the plaintiffs rely to their detriment and to the benefit of the City apparently upon the promise that the rate would be applied in such and such a manner, and there is nothing—no tariff that indicates that it shouldn't or couldn't be applied that way. We have shown in stipulations this was a unique stipulation. It was the first housing project here. It was feeling its own way along and the National Electrical Code itself vests some discretion in the local body to interpret the thing. It doesn't require the City Council approval to interpret it any more than the building inspector has to go to the City Council to say, "No, you have got to put a vent in over in that corner or I won't let you go ahead with your building."

The Court: Now, will you just tell me what it is you would prove; for instance, that the plaintiffs were told by some representative of the City in these discussions and why it is material to the determination of any issue here. For instance, the argument sounds as though their actions were predicated on a breach of contract.

(Testimony of Lela Hall.)

Mr. Cottis: Mrs. Hall was told that she would get combined billing even though there were separate house meters in each building because, as a practical matter, it was good, feasible engineering to put a separate meter in each building rather than a [119] meter from one entry point because of the wide layout. She was told that. The plaintiffs relied on it and I think it is estoppel. Mr. Reischling thinks it is a contract. There is no doubt the City was in a proprietary capacity and I will take issue on Mr. Rader's law on the matter of estoppel.

The Court: Am I to understand this is a breach of contract rather than one of application of schedule?

Mr. Cottis: As outlined yesterday there are three cases on which to recover; one is, we fall clearly within the published rate schedule and haven't been treated accordingly, the second is, the City contracted or chose to deny its original interpretation of that rate schedule, and the third is, discriminatory practice against these plaintiffs by the City.

The Court: Well, since that appears to be the theory of the plaintiffs and since there is no jury here the Court, of course, has great latitude in admitting evidence even though he may feel certain that he will exclude it or give no consideration to it in arriving at a decision and if you make it brief, why, the evidence will be permitted.

Q. (By Mr. Hellenthal): Mrs. Hall, I believe I asked you the question, what, if any, reasons were given to you by the City officials following receipt

(Testimony of Lela Hall.)

of the billings as to why the billings were not combined?

A. The National Electrical Code was the first answer and the [120] second reference was made to Code 55. Now, in turn we offered to pay for the cost of the meters and offered to pay for the cost of an installation which would give us a single billing and we were told again that the National Electrical Code would not permit us to do it.

Q. When was the offer to furnish the capital required to secure the advantages of combined billing made to the City?

A. November and December of 1951.

Q. Was it made on one or more occasions?

A. Innumerable occasions.

Q. And it was made by you? A. Yes.

Q. Now, Mrs. Hall, you have testified that you did not receive billings for the project until, I believe you said, September, 1951?

A. We received—the first few billings came in in September and then rebillings came in in October.

The Court: You say rebillings?

A. Yes, they were incorrectly computed.

Q. What was the difference between the September original billings and the rebillings of October?

A. Mostly arithmetical and additional billings that were completed for occupancy.

Q. It was purely arithmetical errors?

A. Yes. [121]

Q. When were the project buildings occupied?

A. Initial occupancy in July of 1951 with final occupancy completed in December of 1951.

(Testimony of Lela Hall.)

Q. When? A. December of 1951.

Q. And that accounted probably for some of the errors in billing. Did those observations as to occupancy apply to both projects? A. Yes.

Q. Both Panoramic View establishment and Richardson Vista establishment? A. Yes.

Q. Now, Mrs. Hall, when you received—what formal action was taken upon receipt of the separate bills for each building that you described which occurred—and you correct me if I am wrong—in September, 1951?

A. A series of conferences were held with the representatives of the City.

Q. And were any letters written?

A. In November of 1951 we entered a formal protest.

Q. And did you sign that protest?

A. Yes, I did.

Q. I hand you, Mrs. Hall, Plaintiff's Exhibit 1 and will you tell me what it is?

A. It is a protest issued to the members of the City Council [122] and City Manager prior to the City Council meeting and requesting a hearing at the City Council meeting.

Q. Is that protest signed by you?

A. Yes, sir, it is.

Q. And was that protest delivered to the City officials? A. Yes, it was.

The Court: Hasn't that been admitted by stipulation?

Mr. Rader: Yes.

(Testimony of Lela Hall.)

The Court: Then there is no use of asking all those questions.

Q. (By Mr. Hellenthal): Was the protest read to the City Council? A. Yes, it was.

Q. It had been delivered some days prior to that?

A. Prior to the meeting. I don't remember the number of days.

Mr. Hellenthal: Your Honor, may I at this point—I will have difficulty and during the presentation of the case I may sometimes overlap on stipulated matters and I will appreciate it if counsel for the defendant will point out those things to me because I too have no desire to burden the Court, but I do ask for indulgence because it is quite easy to slip over some things.

Q. (By Mr. Hellenthal): Now, Mrs. Hall, you had conferences with Sharp and City officials prior to November? A. Oh, yes. [123]

Q. It wasn't too clear as to when. Could you again, at the risk of being reiterative, tell me the months during 1951 when those occurred?

A. I arrived in April and there wasn't a month that there wasn't a session of some type with the City in development of the new projects.

Q. And following the receipt of the first billings? A. There were a series of them then.

Q. During the month of October?

A. October and November both.

Q. To the best of your recollection who was pres-

(Testimony of Lela Hall.)

ent during the conversations you had with City officials?

A. Oh, goodness. I can enumerate several City officials also. Let's put it this way: Mr. Sharp, Mr. LaZelle, Mr. Pendergras, on occasions you accompanied me, Mr. Hellenthal, at times our Maintenance Supervisor accompanied me and on other occasions Mr. Arthur Cahn accompanied me.

Q. When you referred in your testimony to being billed as one establishment, what did you mean by that, Mrs. Hall?

A. Well, I was in the process of preparing preliminary budgets and during the discussions I went in to get the rate schedules and discussed our whole financial picture and at that time I was told, and Mr. Cahn was with me at the time, that we would be treated as one establishment and we got the rate schedule and discussed billing at the same time because we [124] understood there was also a deposit to be made and we wanted to prepare for the deposit.

Q. Now, in connection with the deposits did you put up a bond for those deposits?

A. Yes. We initially put up \$7,000 in cash and then later secured a bond. It was about three months before the bond was processed and we put up a surety bond and that was put up by the management agency originally then by the two corporations later.

Mr. Hellenthal: I have no further questions.

(Testimony of Lela Hall.)

Cross-Examination

By Mr. Rader:

Q. Mrs. Hall, when you came to the City in April of 1951 you say you reviewed the architect schedule and that type of thing?

A. I was managing 1300 apartments in Seattle. I was invited by the owners to come up in November and review—I went through the plans again in November. I had spent about a month going over the actual proposal and plans and some changes were made during the initial construction period to conform to a better management operation and I spent considerable time on the plans.

Q. When was that? [125]

A. My first trip to Anchorage was in November, 1940, and it was about the five months period prior to that.

Mr. Reischling: I think you mean November, 1950.

A. 1950, I am sorry. November of 1950.

Q. When was the first time you got in on any of this project?

A. In about five months before November so it would be about June.

Q. June, 1950? A. That is right.

Q. When did the construction start on the project?

A. I think Mr. Reischling should answer the dates on construction.

(Testimony of Lela Hall.)

Q. I am asking you the question; to the best of your knowledge?

A. About a year prior to that time.

Q. A year prior to that time? A. Yes.

Q. During June of 1949?

A. Ground breaking, I believe, was in February, 1949. Am I correct, Mr. Reischling?

Mr. Reischling: Ground was broken in August, 1949.

Q. August of 1949? A. Yes, sir.

Q. And the first time you got in on the project though was about a year later?

A. In November.

Q. Well, five months before November so it would be during the [126] summer of 1950?

A. That was the first time I went over the plans of the project, yes.

Q. And do you know if anyone else checked with the City of Anchorage concerning the rates and regulations, electrical?

A. If I should testify to it I would have to testify on a hearsay basis because I have been told by the members of the corporation and was instructed that there had been contacts and that everything had been arranged, but you would not accept my testimony because I can only testify as I actually made the contacts. Is that not correct?

Q. So it is your understanding other people in the corporation did contact the City relative to power rates, is that right?

(Testimony of Lela Hall.)

A. Certainly. Before an F.H.A. development can be constructed you have to have assurance of all your utility services and there are letters in the files guaranteeing utility services.

Q. You have those letters in your files, do you?

A. Sir, I am not employed by the corporations now.

Q. They are in the corporation files?

A. I do not know at this time. I have not been employed for some time by them.

Q. They were in the corporation files when you were with the corporation? A. Yes, sir. [127]

Q. Letters guaranteeing utility services?

A. Yes, sir.

Q. You have seen those?

A. Yes, sir. The signature was Mr. Don Wilson.

Q. To the best of your recollection what did those letters say?

A. Sir, I would not testify unless I had the opportunity to familiarize myself with letters I have not seen for four years.

Q. Do you have any recollection?

A. I would not testify without being able to look at the letters.

The Court: You should testify from recollection. It is only when you don't have any recollection that you are allowed——

A. The only thing I can say, sir, is that I know that the F.H.A. requirements were such and to meet those requirements in the actual loan applications there were letters guaranteeing service written by Mr. Wilson who was then City Manager.

(Testimony of Lela Hall.)

Q. Now, those letters would be dated about when?

A. During the loan application period.

Q. And when would that be?

A. Prior to construction.

Q. To the best of your knowledge when was that?
1948?

A. That I ask Mr. Reischling to confirm the proper date.

Q. I am asking you to the best of your knowledge?

Mr. Hellenthal: Your Honor, this seems kind of silly. The City wrote those letters and the copies are presumably with [128] the City and to ask this witness as to when they were written, when they were dated would be silly. Their own testimony would be better than anything else on the point. I think we are belaboring this thing too much.

The Court: Of course, by the same token you could say that the addressee had the letters also. But the fact he is asking her something of these letters that may also be evidenced by letters is not objectionable and without production of the letters—unless, of course, he would attempt to use the letters for impeachment, and, of course, he wouldn't do that. He wouldn't be allowed to because the rule states no one can be impeached by any writing except by showing the writing to the witness so that all these questions amount to are an attempt to elicit testimony from the witness of her recollection.

(Testimony of Lela Hall.)

Q. (By Mr. Rader): Getting back to those letters; it would be your recollection they probably would have been sent and received in 1948?

A. '48 or '49.

Q. Now, when you reviewed the architect plans, the architect schedule, did you have any occasion to know when your final commitment from F.H.A. was received?

A. I would have to refer back to the record to give you that.

Q. To the best of your recollection?

A. I think you should be asking the owner of the corporation rather than me. [129]

Mr. Hellenthal: You don't know, in other words?

A. I could hazard to guess, but it would be merely a guess.

The Court: You, of course, are not allowed to give testimony based on pure guess, but this is something that seems to me would not be pure guess. A witness is not required to testify to absurdity, only to his best knowledge and recollection, so when these questions are asked you should attempt to answer them to your best knowledge and recollection.

A. It would be approximately 1949.

Q. And now that would be when the F.H.A. approved your final plans for the project?

A. That is right.

Q. Before that time you can make changes in the plans?

A. You can negotiate changes during construction.

(Testimony of Lela Hall.)

Q. And afterwards, too?

A. Changes are in order.

Q. Do you recall whether or not those original letters, which you claim are in the corporation files, made any reference as to rates or meter readings or combined billing? A. I do not know.

Q. You don't recall that?

A. No, I do not know.

Mr. Rader: I would like at this time to ask the plaintiffs to produce those letters if such exist. I have no knowledge of them and I don't know whether they exist or not. [130]

The Court: The plaintiffs should produce them if they can.

Q. (By Mr. Rader): Were any changes made in the wiring schedule, the wiring drawings, subsequent to the final approval by F.H.A.?

A. I was in no position to know of any of the change orders. I do not know.

Q. For all you know the corporations may have planned from 1948 on, without any representation from the City, for the present wiring system they have, is that correct?

A. No, that is not correct.

Q. What do you know to the contrary?

A. I know from contacts with the inspectors with the City of Anchorage that we were required to conform on all occasions to the requirements.

The Court: When you say "conform to"—I don't know whether you said "to the requirements" or "to their requirements."

(Testimony of Lela Hall.)

A. The City of Anchorage approved, through the engineering agency, the plans of the development and they had to be built accordingly. The City of Anchorage had inspectors on the job at all times.

Q. Now, let's get this clear. You don't know whether the corporations ever submitted plans to the City of Anchorage for any wiring system other than the one that exists today, do you? [131]

A. I would not be in position of having made that request. That would have been done by the construction company.

Q. So you don't know?

A. I don't know what transpired.

Q. When you arrived in Anchorage on the spot in April, 1951, what was the condition then as to the construction of those buildings?

A. The buildings were not completed. The outside framing had been completed.

The Court: I think we will recess at this point. Recess for 10 minutes.

(Whereupon, at 11:15 o'clock a.m., following a 10-minute recess, Court reconvenes, and the following proceedings were had.)

Mr. Rader: If it please the Court, I would like to also ask counsel for the plaintiffs to produce the drawing showing the electrical system as approved by F.H.A., together with the date for the projects involved and also any changes in those which were approved by F.H.A.

Mr. Hellenthal: Your Honor, I should like to be

(Testimony of Lela Hall.)

heard on that. Under the ordinances of the City of Anchorage, which I need not go into here, the plans for all buildings, electrical, plumbing, heating installations, in the City of Anchorage must be approved by the City of Anchorage by its Building Electrical, and Plumbing Department before work can proceed. There must be [132] approvals posted on the job; approvals procured from the City in its capacity as inspecting official and governmental capacity. Before a nail can be driven or before a wire can be strung the plans must be stamped approved by the appropriate City of Anchorage department and filed with that department. And it would seem to me that if the City desires that evidence that it need only walk literally across the hall to its own building official where all plans and changes are on file and get them. We will certainly cooperate in every particular and if we thought they were material we would have gotten them through the City because the only appropriate plans are the plans that the City has in its own files. Those are the official plans.

The Court: This is cross-examination and he has a right to ask for this information. Objection overruled.

Mr. Hellenthal: Can he secure the information from us on cross-examination, secure the evidence?

The Court: I assume, of course, a demand for the production of some documents can be made at any time during the trial of a case and I assume he

(Testimony of Lela Hall.)

demands this to use for cross-examination or for rebuttal of this witness' testimony.

Mr. Hellenthal: All right. I just want my observation made so the Court will be aware of it.

Mr. Rader: If it please the Court, I think the Court should also have the further observation that I believe this was during the period Mr. Hellenthal was City attorney. I personally [133] don't know what the system was at that time as to the plans.

The Court: There is no use in arguing it. I have held that the demand was proper and should be complied with and that should end it.

Q. (By Mr. Rader): Now, I think you testified that the reason for the placement of the buildings as to density was F.H.A. requirements?

A. Yes.

Q. And the reason for the 2 stories was because of your lease?

A. We had a height provision. We could not exceed above a height provision.

Q. And I think you testified as to why that was?

A. The close proximity to the Base. It is actually Base land.

Q. You are guessing on that now, aren't you?

A. No, sir. The ground leased is Base land.

Q. You are saying that you know why they limited you to 2 stories, is that correct?

A. It is in the lease.

Q. Are you able to tell me why the military limited that lease to 2 stories, other than a guess?

A. The military requirements are that there be

(Testimony of Lela Hall.)

no structures above a specified height and that height has been a military requirement because of the hazard with the Base.

Q. Because of the hazard with the Base?

A. Hazard of flight, close to the Base. [134]

Q. You are guessing on that, aren't you?

A. No, sir, I am not.

Q. That is their reasoning?

A. That is correct, to the best of my knowledge.

Q. How much did the leases cost you?

Mr. Reischling: I object. That is immaterial and irrelevant. It has no bearing in this case.

The Court: I should think that would be wholly immaterial.

Mr. Rader: If it please the Court, I merely want to show they are creating the elusion they were forced by all these regulations. I want to show they had a good many advantages out of this situation. They voluntarily chose to build their buildings in a certain manner pursuant to the regulations, true, but there are some advantages to it. They are not the underdog all the way through on this thing. I think the lease price is one thing which will make the advantage obvious.

The Court: Suppose you could show that advantage, what would it tend to prove or disprove that is in issue here?

Mr. Rader: Well, what does it tend to prove or disprove? Well, the evidence is that it is governed by F.H.A. and they only have 2 stories——

(Testimony of Lela Hall.)

The Court: You didn't object to it when it went in.

Mr. Rader: Well—all right.

Q. (By Mr. Rader): Do you know what the condition of the wiring was in the [135] project the first time you talked to the City Manager?

A. To be more specific, do you mean, was it completed?

Q. Yes. A. No, it was not completed.

Q. The wiring?

A. No, it was not completed.

Q. When did you first talk to Mr. Sharp?

A. I met Mr. Sharp within 2 days after arrival in Anchorage, which was in the early part of April.

Q. I think you stated on direct examination the first time you talked to him was in August, 1951, about rates?

A. The actual speech about rates, that I can make a definite reference to, was in August, 1951.

Q. At that time some of the buildings were already occupied, weren't they?

A. The buildings were occupied.

Q. So the wiring was completed on those?

A. In August, yes, sir, on a portion of the buildings.

Q. And it was completed on a good many of the others, the wiring?

A. It depends on what part of the wiring you are referring to. The last installation was meters. The panels had been in prior to that time.

(Testimony of Lela Hall.)

Q. Did you have temporary power at that time or do you know?

A. There was a temporary hook-up during construction. [136]

Q. You say you talked to Mr. LaZelle, Mason LaZelle, City Electric Superintendent?

A. On many occasions.

Q. And did he represent to you that the National Electrical Code was the reason the City wouldn't permit this? A. Yes.

Q. That is what he represented to you?

A. Yes.

Q. When did he do that?

A. On one occasion, it was during the City Council meeting and on another occasion it was the day prior to the City Council meeting which there was a hearing.

Q. That would have been in November?

A. That is correct.

Q. Actually what did you ask the City to do; combine the meter readings and give you one rate? Is that what you asked them to do?

A. We asked for combined billing, you are correct, because under the interpretation of the ordinance as it was written we believed we were entitled to a single billing because all the buildings were identical and we had been treated as one customer or had been told we were being treated as one customer.

Q. Now, did you appear at the City Council meeting? A. Yes. [137]

(Testimony of Lela Hall.)

Q. With your counsel, Mr. Hellenthal?

A. Yes, sir.

Q. Did anyone else from the corporation appear?

A. Yes, Mr. Arthur Cahn.

Q. And at that time did you discuss these matters with the City Council and lay your case before them completely?

A. Yes, we had presented a letter specifying our request.

Q. And you also discussed and talked at that time?

A. Yes, sir.

Q. They just didn't read the letter but you discussed back and forth and asked questions, a little argument, that type of thing?

A. They decided first to table it then later decided to take action.

Q. But you did discuss it back and forth? They heard you, didn't they?

A. We appeared before the City Council.

Q. And you got to say whatever you wanted to say, didn't you?

A. As much—I don't think——

Q. Well, you are not going to cuss them out even though you feel like it, but you presented your case to them?

A. Naturally.

Q. And what was the case presented to them? The same thing you mentioned before that your meter readings should be combined? [138]

A. We had been told that we would be treated as one establishment and one customer and we had discussed with them that same approach and the

(Testimony of Lela Hall.)

only question that came up at that time was the City needed additional revenue. There was no discussion of the fairness. We were told that the electrical safety code would not permit us to have one meter reading.

Q. The only thing you requested of the City was to combine your meter readings and give you one meter reading, is that not true?

A. No, sir. In addition to that we offered the City any opportunity we could avail ourselves of, any changes we could make at our expense to get a combined billing rate.

Q. Did the City Council tell you at that time that they didn't combine meter readings for anyone else in town?

A. They said they would survey a number of what they thought might be like situations and there was to be a follow-up meeting to discuss it.

Q. Was there a follow-up meeting?

A. They also told us at that time there would be also a rate analysis. There had not been a change in the rates for approximately 8 years, it was represented to us at that time, and that there had been a rate study under way and there would be changes coming.

Q. Did the City Council—actually at that time they did not know or have knowledge that the practice of the City was not [139] to combine meter readings?

A. I don't—

Mr. Hellenthal: Your Honor, of course, she can't answer that.

(Testimony of Lela Hall.)

Q. You don't know what they told you, is that correct?

A. I can't testify whether the City does or doesn't have combined billing rates.

Q. I am not asking you that. I am asking you what the City Council told you or what was told you at that meeting?

A. Our request was denied at that meeting on the basis that the National Electrical Safety Code would not permit us to have a single meter reading.

Q. Did you ever in writing discuss the National Electrical Code, include it in any of your memorandums, any of your protests or anything else?

A. I would have to go back through the correspondence to check. I can't answer it without going back through it to actually check. To my present recollection I can't remember any.

Q. You can't remember any? A. No, sir.

Q. In the protest you filed with the City all you wanted was combined billing?

A. We asked for combined billing and asked for any method we might arrive at a combined billing rate.

Q. Do you have any correspondence from the City prior to the [140] summer of 1954 or do you know of any correspondence between either one of the plaintiffs and the City prior to the summer of 1954 which discussed the National Electrical Code or even mentioned it?

A. I am sorry, I do not know.

Q. What is your recollection?

(Testimony of Lela Hall.)

Mr. Hellenthal: She said she didn't know.

The Court: She can testify from recollection.

Q. Do you have any recollection?

A. No, I do not.

Q. You mentioned everything else in your correspondence though, didn't you?

A. Well——

Q. Well, every other phase of this thing, didn't you, just about?

A. We tried to include everything we could.

Q. You tried to include everything you could; everything that was at issue and every argument disputed?

Mr. Reischling: I submit, if the Court please, the letters would be the best evidence and the City has them if there was correspondence between this witness and the City.

The Court: It would be if he was trying to prove something substantively, but for correspondence the best evidence rule doesn't apply.

Q. Now, it is your testimony that Mason LaZelle turned you down on the basis of the National Electrical Code? [141]

A. Interviews were held with Mason LaZelle, who is the Electrical Superintendent, I believe that is his correct title, and he also testified at the City Council meeting that the National Electrical Safety Code would not permit us. Reference was also made to Code 55 of the City of Anchorage.

Q. When did you offer to pay for the meters and installation?

(Testimony of Lela Hall.)

A. In November and December of 1951.

Q. Do you have any correspondence which says anything of that nature?

A. There were conferences held at which there were minutes taken.

Q. Do you have those minutes?

A. I would have to check and see if they are available. I do not know.

Mr. Rader: I would like to make a notice to produce on that also of the minutes of conferences showing there was discussions of the National Electrical Code at that time or near that time.

The Court: The plaintiffs will produce them.

Mr. Rader: Also that they offered at that time to pay for the meters and their own installation and their own distribution system.

Mr. Cottis: Your Honor, before the plaintiffs are required to produce them I think that Mr. Rader should show whether the City took the minutes or whether the plaintiffs did.

Mr. Hellenthal: Who took the minutes? [142]

Q. (By Mr. Rader): Who took the minutes?

A. I am sorry, I am not sure.

Q. How do you know minutes were taken?

A. Just that during the discussions we had some joint minutes we discussed back and forth. I don't know whether it happened to be Mr. Sharp's secretary or if it happened to be mine. We met a number of times and discussed it.

Q. Now, you don't know about the minutes or whether you have them, is that correct?

(Testimony of Lela Hall.)

A. I don't know whether they are there. I have not been in Anchorage for——

Q. You don't even know if they were actually taken, do you?

A. There were minutes taken which I have so stated. Whether they are still in existence I cannot guarantee.

Q. Well, you don't know whether they were taken by Mr. Sharp or by yourself, under your direction or his?

A. Both of us took notes by one secretary and on occasions where those specific items were discussed I don't know which one of us used our secretary. We alternated at different times, depending on where the meetings were held, depending on whether it was in his office or in mine.

Q. You don't know whether you instructed your secretary to take notes or not?

A. If it was in my office my secretary took notes; if it was [143] in his office his secretary took notes.

Q. Did you have meetings in your office?

A. Both places.

Q. You made minutes for the ones in your office?

A. I have no way of knowing—I have been gone for some time—whether those are still in existence or not. You see, the companies have been sold and I have no way of knowing whether they are still in existence or not.

Q. But when you left the companies they were in existence?

(Testimony of Lela Hall.)

A. I have a firm recollection that there were minutes, but to tell you where they are at this time I cannot.

Q. When you left the company there were minutes, is that correct?

A. To the best of my knowledge.

Q. And which would be minutes kept by your secretary?

A. Or Mr. Sharp's secretary, depending upon where the meeting was held.

Q. Well, there would be some from your secretary?

A. That is right. There is one which I made a specific reference to the National Electrical Safety Code and I am not sure which session that came up without looking back and being able to check.

Mr. Rader: As long as we understand our notice to produce, I am asking the plaintiffs to produce any minutes or correspondence relative to their offer to put in their meters and own distribution system prior to the summer of 1954, if such [144] exists.

The Court: The plaintiffs are ordered to comply with that demand.

Q. Do you know anything about a contract between the City of Anchorage and the plaintiff corporations concerning an easement for a substation site located on your property?

A. I did not execute that contract. I am familiar that there is one in existence.

(Testimony of Lela Hall.)

Q. Have you ever seen the contract?

A. No, just that I know that certain lands were liad out and construction was referred to, but the maintenance supervisor is the one that actually handled the coordinating of the location.

Mr. Hellenthal: Your Honor, in an interest to expedite this I know this wasn't covered on the direct.

The Court: Beg your pardon.

Mr. Hellenthal: I know this wasn't covered on the direct examination.

The Court: Will you read that question?

(Whereupon, the reporter read question line 9 and answer line 10 above.)

The Court: I don't see how that could be within the scope of the direct examination.

Mr. Rader: Well, if it please the Court, she was manager here during that time and she has testified she had full [145] and complete and thorough understanding and knowledge of it and I wondered if she knew about this and was familiar with the terms of it. That was the reason I asked it.

The Court: Well, you mean it is for the purpose of testing her recollection. Is that it?

Mr. Rader: Yes.

The Court: Well, I am just wondering whether you mean her recollection as to the construction of this project or something else.

Mr. Rader: Her recollection actually as to the fact they did give a permit to the City to put up a

(Testimony of Lela Hall.)

substation and there were some clauses in that agreement which might be of interest as to whether she is familiar with it generally. Apparently if she is not we will forget about it.

The Court: Usually you test recollection not by bringing entirely extraneous matters into the case, but by referring to something within the scope of the direct examination. In other words, when a person testifies to one subject and has a good recollection concerning most of it and no recollection concerning some part of it, why, you may predicate an argument on that. That goes to the credibility of the witness. But when you pick on something outside the scope of the direct examination, something entirely extraneous, that wouldn't necessarily be a test of credibility or test of recollection. [146]

Q. (By Mr. Rader): Did you ever have occasion to discuss with these people and did they ever tell you the common practice by the City of Anchorage was to combine meter readings?

Mr. Hellenthal: Your Honor, I object to any questions, either on cross or direct, dealing with policies of the defendant. This matter is purely a matter of promulgated rates pursuant to clear ordinances and any testimony as to hidden, unpublished policies——

The Court: It just goes to part of the discussions, so the objection will have to be overruled. This is not reaching into some other field or anything of that sort. This is for the purpose of cross-examining her as to what was said in these discussions.

(Testimony of Lela Hall.)

Mr. Hellenthal: I still want to register my objection to any matters dealing with policies.

The Court: Objection overruled.

Mr. Rader: I am sorry, did Your Honor sustain the objection?

The Court: No, I overruled it.

Q. (By Mr. Rader): Did you have any understanding as to the policies of the City of Anchorage concerning combined meter readings?

A. I answered you, I think first and let me again repeat it this way, that my early conferences with Mr. Sharp indicated that we would be treated as one consumer with one billing. [147]

Q. Did you subsequently have occasion to inquire around, become acquainted——

A. It was only after receipt of the billing and there was a question at that time as to whether it was properly done or not and they waited for Mr. Sharp's return from out of town to establish whether it had been properly done.

Q. Let me ask you this: Do you know of any other instances in the City of Anchorage or ever hear of any other instances where there is combined meter readings?

Mr. Hellenthal: Your Honor, that is beyond the scope of the direct examination.

The Court: I think it would have to be her knowledge with reference to such matters. It would have to be in order to be relevant here, before or at the time of these discussions with the City because otherwise it would be immaterial. If she knew

(Testimony of Lela Hall.)

of this in her discussions with the City presumably it would be something that would affect the discussions, what was said there, but otherwise if it was knowledge she acquired later it would be immaterial.

Mr. Rader: Wouldn't it be material, Your Honor, if we did have a policy and although she was perhaps ignorant of it for several months after her first billing in September or April when she came up here, wouldn't the fact that we had a policy and she found out in September of that policy——

The Court: Wouldn't it be material as to what? [148]

Mr. Rader: To establishing the policy and the fact there has been no departure from it.

The Court: You don't mean to tell me you are going to rely on this witness to establish a policy of the City of Anchorage?

Mr. Rader: I don't have any doubt she will testify to just exactly what the facts are and the fact is that it is the policy.

The Court: Well, as I have said before I think that would be a proper subject of inquiry if it were shown that she had discussions with matters of rates after she learned of it.

Mr. Reischling: If the Court please, may I add this—does a policy—does it become a substitute for an ordinance in this case? Are we trying the case on an ordinance and on published rate schedules or

(Testimony of Lela Hall.)

something that is subject to change without notice?

The Court: I don't think that is the purpose of it or that that would be the test of determine whether this is admissible. It is a matter that since the question of good faith of the City has been raised here, whether it bears on the question of good faith, but, as I say, I don't see how it could have a bearing on good faith or anything else unless after having learned of this policy she had further negotiations with the City. [149]

Q. (By Mr. Rader): When did you learn of the policy; at the council meeting?

Mr. Reischling: I object. She has never testified she learned of any policy. The question is a double barreled question. She hasn't testified she learned of it.

The Court: He assumes a fact not yet in evidence, that is true, so——

Q. (By Mr. Rader): You did find out that was the policy?

A. All I had to go on was the published rate schedule and we followed the published rate schedule and felt we were living within the provisions of the published rate schedule.

Q. You talked to other people about this?

Mr. Reischling: That is argumentative. I object to that.

The Court: Objection overruled.

Q. Didn't you?

A. I discussed it with City officials, City councilmen following the billing and there was a great deal of difference of opinion.

(Testimony of Lela Hall.)

Q. Was it your understanding you didn't understand it was the policy of the City not to combine meter readings? Is that your testimony?

A. I was assured by Mr. Sharp that we would be treated as one customer and I still feel that that was his commitment made.

Q. I am not asking you—— [150]

Mr. Reischling: Let her finish her answer.

Q. Are you through? A. Yes.

Q. I am asking you when you found out the policy was—or what the policy was with the City in regards to combined meter readings?

Mr. Reischling: I object. That is assuming a fact not in evidence.

The Court: Do you contend that that fact is in evidence; the fact that she knew of the policy?

Q. All right. Did you ever find out it was the policy of the City not to combine meter readings?

A. All I can go back to is what the rate schedule says and the only answers I ever got to my questions was that the National Electrical Code would not permit us to have a single reading.

Q. Is it your testimony Mr. LaZelle, Mr. Sharp and City councilmen didn't say something to you like this, "We don't combine meter readings. We don't have one situation in the City where we give a person a lower rate." Did anyone say anything like that to you?

Mr. Reischling: I object. She did not testify to that. He is assuming something not in evidence. She

(Testimony of Lela Hall.)

has not testified to that. Counsel is testifying so maybe he should be sworn.

The Court: There isn't anything in this last question that assumes any facts not in evidence. He is asking her if she [151] ever learned of this and the fact that he omitted something by way of argument doesn't affect the propriety of the question.

Q. Did you ever learn of that?

A. Not in those words.

Q. All right, you tell me the words you learned them in?

A. We were asked during the discussion, what we had asked following the discussion, what we could do to have a single billing rate because we felt that we were entitled to it on the basis of our plan, our layout, the type of customer we were. The ordinance provided—the rate schedule provided that we were eligible for it and it was during that discussion.

Q. What did they say?

A. At no point have we actually received any correspondence which says, "You are not eligible to a single billing rate."

Q. I am not asking you that. I am asking you about the policy you started telling me about; how you got it and when you found out about the policy? What did they tell you the policy was?

A. I cannot quote the City policy.

Q. I am asking you to tell me in substance what it was?

Mr. Reischling: I am still objecting. It is not in evidence. She hasn't testified she learned——

(Testimony of Lela Hall.)

The Court: He is asking her when she learned of this policy that has been under discussion for 15 minutes. There can't be any misunderstanding about it. Objection overruled. [152]

Q. (By Mr. Rader): Now, would you please answer the question?

A. The only answer I can give you is when I first received billings on individual buildings was the first I had any awareness there was not a meeting of the minds that there would be single billings.

Q. When did you—or did you testify you finally found out the policy was not to combine meter readings?

A. I haven't testified to any policy because I am not in a position to quote the City policy. I only say to you I refused these bills and there was even a question then of whether it was properly billed or not.

Q. Let's go through this once again slowly. Did you go to the City council then and City officials and talk to them?

A. Yes, sir. I appeared at a City council meeting.

Q. And did any City official or did the City council represent to you that the policy of the City was not to combine meter readings?

A. We were told we would receive an individual billing. I do not remember a specific statement of the policy by any member of the City council.

Q. I am asking you what you were told at this time, not what you were told before?

(Testimony of Lela Hall.)

A. At that meeting and the answer was that the City needed the revenue, and, therefore, we would be billed on the basis of [153] individual meters.

Q. Mrs. Hall, you have had occasion to discuss this billing procedure with a lot of people, haven't you?

A. It depends upon when you are referring to.

Q. Around town here?

A. I haven't been around town for a year.

Q. You were here for 3 years though, weren't you?

A. That is correct.

Q. During that time did you discuss it with anyone else?

A. I have discussed billing with a number of persons. My experience in previous billing had been a combined billing where I operated 1300 units. We had a combined billing which was customary practice.

Q. I didn't ask you that. I asked you if you discussed it with anyone around here. Please answer my question, if you can?

A. Of course, one discusses billing.

Q. You discussed it with apartment house owners, did you?

A. I am aware of the practice of some of the other apartment house owners.

Q. Did you discuss it? A. Yes.

Q. Who else did you discuss it with?

A. It would be difficult to name the number of people that I discussed it with.

(Testimony of Lela Hall.)

Q. You discussed it generally around here, didn't you? [154]

Mr. Reischling: If the court please, may I ask for the record that counsel establish what period of time he is discussing or talking about. Now, is it this week or last week or a year ago?

The Court: Well, he referred when he began this line of questioning to the period she was in Anchorage. Objection overruled.

Q. You have discussed it with a good many people? A. Surely.

Q. Did you ever discuss with them combined meter readings?

A. I am aware of the readings in certain buildings, yes.

Q. Do you know of any place where they combine them?

A. I know that the plans were completed so that a single billing would be made to certain buildings and I know other buildings that made alterations in their plans in order to get a single billing.

Mr. Hellenthal: Could you read that please.

(Thereupon, the Reporter read the last answer above.)

Q. (By Mr. Rader): In other words, people would change the wiring in their premises so that they would have one service drop and one meter. That is what you are talking about, isn't it?

A. Right.

Q. Let me ask you if you know of any apartment houses served by the City of Anchorage which are

(Testimony of Lela Hall.)

separate houses and [155] under one ownership where the City combines meter readings as you have asked to have done?

A. I don't know that anyone else has a comparable situation in the City of Anchorage, however, you have buildings where you have a group of apartments that are under a single roof that have a combined billing.

Q. Yes, we just bill you once for each single building.

A. But no one else that I know of has a comparable situation where they by requirements had to establish more than one building.

Q. You are talking about the 1200 "L" Apartments, for instance, which may be 8 stories high?

A. Uh-huh.

Q. And contain a hundred or so apartments or maybe two hundred. I don't know.

A. Uh-huh

Q. Is that what you are talking about?

A. That is right.

Q. They cover maybe a quarter of a block, one building? A. That is right.

Q. They have one meter and one billing, is that right, for their house lights?

A. As far as I know.

Q. Are you familiar with the E & E Apartments?

A. Yes, sir. [156]

Q. Would you describe those to me, please?

A. The E & E has 3 buildings with 96 units and they are individually metered. They are also included in our request for adjustment as a separate

(Testimony of Lela Hall.)

site development in which the owner should have the right of combined billing of the 3 buildings

Q. E & E is like Panoramic View and Richardson Vista in that situation?

A. That is correct.

Q. What is the practice of the City of Anchorage with regard to them?

A. All of our payments for E & E have been made under protest in identically the same manner as payments were made for Pan. and Rich.

Q. Are you also the agent for E & E?

A. I was agent for E & E.

Q. Are they the same owner of these apartments?

A. Which period of time and which specific project are you referring to? There is a difference in ownership.

The Court: I think we will recess at this time. I wonder if it would be inconvenient to anybody concerned here if we reconvened at 1:30?

Mr. Hellenthal: Excellent.

Mr. Rader: Fine.

The Court: Recess to 1:30. [157]

(Whereupon, at 11:50 o'clock a.m., the court continues the cause to 1:30 o'clock p.m.)

(At 1:30 o'clock p.m., counsel for plaintiffs and counsel for the defendant being present, the trial of said cause was resumed:)

The Court: The witness will resume the stand.

Q. (By Mr. Rader): Mrs. Hall, do you know

(Testimony of Lela Hall.)

whether or not there was any changes in the drawings and the engineering for electricity and service of electricity of that project, or either of the projects during the time in 1951 when you were in Alaska? A. I do not know.

Q. I am a little bit confused. If this is repetitious you will excuse me, but did you ever find out that the policy of the City of Anchorage was not to combine meter readings?

A. I think I answered that and the only way I can answer is that I am not familiar with the statement whether it is or is not a policy.

The Court: But that isn't the question. The question is did you ever learn of the policy?

A. No, sir.

Q. (By Mr. Rader): You never learned of that policy? A. No, sir. [158]

Q. You have never been present when that was claimed?

A. I do not know of an actual policy.

Q. I am handing you Exhibit K and directing your attention to the last paragraph on page 2 and the top paragraph of page 3.

A. What is the Exhibit? Exhibit K?

Q. It is the notes of the council meeting of November 9, 1951, and ask you if the minutes when they say as follows: "It was determined that the request, if granted, would alter the established policy of billing electric energy for each individual building and thereby also affect many others who own more than one building in the community and are

(Testimony of Lela Hall.)

being billed on a separate unit basis." Do you recall anything of that nature?

A. I have never seen these minutes and the discussion was primarily one of whether it should be granted and not being one of whether it was fair to grant a combined billing, but the loss of income to the City was the main discussion.

Q. Well, I am asking you to refresh your recollection of that meeting, in which you were in attendance, by reading those notes and ask you if those official records to the best of recollection are incorrect or correct?

A. I ask to hear the tape recording which was taken at the time because I do not remember this wording.

Q. I am not asking you about the wording, Mrs. Hall. I am asking you about the policy and what was said there in substance? [159]

Mr. Reischling: If the court please, may I ask if counsel contends that the minutes are the complete proceedings that took place at that council meeting?

Mr. Rader: No, I don't contend any such thing.

Mr. Reischling: Obviously if this is not the complete record or transcript it is improper for counsel to attempt to have this witness testify to the complete transaction when merely a part of it has been transcribed.

The Court: I don't see anything improper in it for cross-examination. Objection overruled.

Q. Now, I am asking you again if the matters

(Testimony of Lela Hall.)

reflected in the minutes there as to policy were in fact stated at the meeting?

A. I remember no policy actually being determined. I mean, the only way I can answer you is, as I remember it was primarily a discussion of whether the City could afford the difference between a combined billing or individual billing. There wasn't a discussion. We were told out and out that the National Electrical Code would not permit us and that was testimony given at the City council meeting by Mason LaZelle. We were not told it was City policy other than they were following the National Electrical Safety Code, so that I have no knowledge of a policy or regulation other than the rate regulation that is in your telephone book.

Q. Mrs. Hall, I am merely asking you if what is reflected in those minutes, in that particular paragraph that I read to you, [160] is true or false to the best of your recollection?

A. I can't answer you because this is someone's interpretation of what went on. My interpretation I have tried to give you in detail.

Q. In your interpretation is that true or false? Can you say?

A. It says, "It was determined that the request, if granted, would alter the established policy of billing electric energy—" I was not aware of the policy so how can I answer you?

Q. Was there any discussion to that effect?

A. I remember no discussion of a policy. I have answered you that I remember and definitely

(Testimony of Lela Hall.)

can point out the conversation that went on between Mason LaZelle and other City council members in which he quoted the basis; not that there was a policy of the City of Anchorage because it hadn't been presented as far as I knew up to that point.

Q. To the best of your recollection would you say that those records are false?

A. I have no way of answering whether they are false or correct.

Q. You can't say? A. No, sir, I can't.

Q. That is fine. Is it your testimony that Mason LaZelle stated to you that the National Electrical Code prohibited combined meter readings?

A. Would not permit a single meter for the projects.

Q. Would not permit a single meter for the projects? [161] A. That is right.

Q. Now, that is different than combining the readings?

A. But his answer to us on a request of adjustment was that the National Electrical Code would not permit the installation of a single meter and he answered to us that they were working under, I believe it is Ordinance 55, isn't it? Am I right? I don't remember.

Q. I didn't ask you about Ordinance 55. I am asking you about the National Electrical Code. Your own counsel will ask you about these other things. You just answer my questions.

(Testimony of Lela Hall.)

Mr. Reischling: I object to the attitude of counsel. He asked her about a conversation and her answer was proper for the question that he asked her.

The Court: Well, she volunteered the statement about Code 55 and he merely pointed out to her that he was not asking about Code 55.

Q. Now, you state that he said that the National Electrical Code would not permit one meter for the whole project? A. That is right.

Q. Now, what did he say as to why you should not have 33 meters and combine the readings?

A. He gave me the same answer.

Q. That wouldn't change the wiring, would it, from what exists?

Mr. Reischling: I object. That is argumentative.

Mr. Rader: I am going to make sure we understand each [162] other.

The Court: Yes, I think in view of the testimony given by the witness on those matters that this is not exactly argumentative.

Q. (By Mr. Rader): Would you go ahead and answer me, please?

A. Would you repeat your question, please?

Q. Merely leaving the meters as they presently exist today and as they have existed throughout the period of time in discussion, the fact you would sit in your office and combine those readings and apply a different reading has nothing to do with the

(Testimony of Lela Hall.)

National Electrical Code, does it?

A. Your wiring would make the difference.

Q. The wiring is left just like it is.

A. That is why we asked for the rate.

Q. We wouldn't have to change it at all?

A. That is why we asked for the rate.

Q. Why did they tell you they would not combine the meter readings?

A. We were told they would combine them to begin with.

Q. Why did they tell you later on they would not combine meter readings?

A. Because there would be a loss of revenue to the City.

Q. It didn't have anything to do with the National Electrical Code, that part, did it? [163]

A. That was the reason we were not given permission to tie in and use one billing.

Q. Well, the reason that they did not combine meter readings had nothing to do with the National Electrical Code, did it?

A. We asked for an application of rates and they told us it could not be used because of it.

Q. Maybe we don't understand each other, Mrs. Hall. Assume for a moment that the wiring as it is up there complies with the National electrical Code——

A. That is a fair subject. It had to.

Q. It does? A. That is right.

Q. It is a fact. Now, you don't have to change

(Testimony of Lela Hall.)

any wiring or anything else to add up the meter readings and give a different rate, do you?

A. No.

Q. That has nothing to do with the National Electrical Code——

Mr. Hellenthal: I didn't hear your answer, Mrs. Hall. No, was it? I saw your lips move but I couldn't hear anything.

A. No. Actually we were led to believe that because of the National Electrical Code we could not be considered and that was Mr. LaZelle's interpretation of it.

Q. Do you mean to tell me that Mr. LaZelle said and represented to you that even though the wiring is exactly as it is and would not be changed one bit by combined meter reading that [164] the National Electrical Code did not permit that? Is that your testimony?

A. May I add the other part to that? I mean, he included at the same time Ordinance 55 or Code 55 and the National Electrical Code and those are the two things that I have answered each time.

Q. I am trying to break this down.

A. I don't know which part of it—I can only answer those with the two things which were told and the reason we couldn't do it.

Q. Is it your testimony that he said that the National Electrical Code had anything to do with

(Testimony of Lela Hall.)

combined billing, adding up the meter readings and applying a certain rate? Is it your testimony that he argued that that had something to do with it?

A. I have told you each time that it was a combination of the two reasons that they gave us that we could not do it.

Q. As a matter of fact he said, "We are not going to combine your meter readings because it is not the policy of the City. We have never done it and we are not going to."

A. No. It wasn't a question of policy; it was a question of income. We were told there would be a rate revision in the near future. It had been 8 years since there was a rate revision.

Mr. Rader: I would like to ask counsel if they have been [165] able to produce any letters or if they have attempted to produce any letters, correspondence or minutes showing any mention of the National Electrical Code prior to the summer of 1954?

Mr. Hellenthal: No, we have not other than the—I doubt if we will be able to other than the conversations that have been testified to and will be testified to by other witnesses.

Mr. Reischling: On behalf of Panoramic View I asked Mr. Sarno to check through the file to see if anything had been left there that counsel had asked for and we have nothing in our files in respect to these particular matters that he asked for.

(Testimony of Lela Hall.)

The Court: Are you speaking now of one or all of the things that he asked for?

Mr. Reischling: We have nothing in Panoramic View, Your Honor, other than what we have produced here in court. I think we have brought in a couple of maps on the wiring, but that is all we have. We have no correspondence other than has been produced here in court.

Mr. Hellenthal: My understanding of the question was limited to correspondence. The map then is another matter

Mr. Rader: You have the electrical drawings?

Mr. Hellenthal: Well, we just served a subpoena on the City Manager and City Clerk to produce the approved electrical drawings from the City Electrical Department and they probably will have them shortly.

Mr. Rader: If it please the court, may I at this time [166] serve a subpoena on them to produce the same thing. Now, your Honor ruled this morning that I had a right to do that under order, to produce. Suddenly they come around with a subpoena and say, "No, you are going to produce it."

Mr. Hellenthal: I didn't probably amplify my answer sufficiently. We also have a great number of electrical drawings and maps that we shall produce.

Mr. Rader: Are they available at the moment?

Mr. Hellenthal: I have some here and some

(Testimony of Lela Hall.)

will be coming in a few minutes. Now, whether they are complete or not I don't know, but we will find out very shortly. People are gathering them up at this moment, others are in Seattle and as the Court knows we did not anticipate this request on behalf of the defendant because the approved plans are on file with the City and when my clients asked me as to what plans they should bring I said, "Well, you can bring whatever you can lay your hands on readily, but you need not worry about it because the plans are by law required to be on file with the City and we can use those."

The Court: Of course, the only question that presents itself to the court upon a demand of that kind is who would be presumed to have them. Now, it seems to me that since the plaintiffs here found fault with this arrangement of billing from the very beginning that it would be presumed that they would be in better position to supply these documents than the City which has not only like documents from probably thousands of other places, but [167] also from the plaintiffs and so it seems to me that the ones who should logically produce the documents are the plaintiffs.

Mr. Hellenthal: I can give Mr. Rader the documents I have now. I think this is all he wants. I have here the plot plan and utility layout.

Mr. Rader: If it please the court, if he will give me the opportunity to examine these we need not discuss them.

(Testimony of Lela Hall.)

Mr. Hellenthal: Let me just list them. I have here Panoramic View as built plot plan and survey made by Hewitt V. Lounsbury, Registered Engineer.

The Court: What is the use of dictating that to the reporter since the defendant may not want to use any of them?

Mr. Hellenthal: Well, here it is and here is the other one for the other project.

The Court: It is my understanding you want to examine those during the recess or do you wish to examine them now?

Mr. Hellenthal: Then I have here Electrical Plan 22-unit building, prepared by E. C. Fields, Registered Engineer, which is the plan for every building.

Mr. Rader: Is that all you have?

Mr. Hellenthal: Other than what the City will undoubtedly furnish us and there may be some more coming.

Mr. Rader: These plats relate to electrical wiring. They are electrical wiring plans?

Mr. Hellenthal: Not all of them. There are some [168] overlapping. Now, if you want me to identify these, your Honor, I can answer the question.

Mr. Rader: Never mind, we can look at them. If it please the court, could I ask for a 10-minute recess to examine these?

The Court: Yes, if you think it will take that long.

(Testimony of Lela Hall.)

Mr. Rader: Well, there are about 15 pages——

The Court: Well, you may notify the bailiff. We will recess subject to call and you may notify the bailiff.

(Whereupon, at 2:02 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had.)

Mr. Hellenthal: I have also produced, your Honor, the as-built plans for the entire project and the specifications, a pamphlet of some 60 or 70 pages.

Mr. Rader: I would like to continue with this witness.

The Court: Very well.

Q. (By Mr. Rader): Mrs. Hall, you say you are familiar with the E & E apartments?

A. Yes, sir.

Q. They are 2-story apartment buildings, are they, with a basement? A. That is correct.

Q. Very similar to the ones up on the hill, Panoramic and Richardson?

A. It depends on what you are referring to, the similarity. [169]

Q. How many units are there in each building?

A. Let's see. There are 3 buildings totaling 96.

Mr. Hellenthal: May I object as beyond the scope of the direct examination?

The Court: No, it is not beyond the scope of the direct examination. Objection overruled.

(Testimony of Lela Hall.)

A. 32 units to a building.

Q. How far apart are the buildings?

A. Oh, about 30, 40 feet.

Q. Each of those buildings has a separate house meter? A. Yes, sir.

Q. And a separate meter for each of the tenants?

A. Yes, sir.

Q. That is just exactly like Panoramic View and Richardson Vista? A. That is correct.

Q. And the 3 billings for those house meters are considered separate and individual in the same manner as you are being treated?

A. Those bills were paid under protest just the same as the other developments. You asked me if they were being paid the same?

Q. Are they being billed the same way to you?

A. Yes.

Q. And they are being paid under protest?

A. Yes.

Q. Now I am asking you about Jefferson Court Apartments. Are [170] you familiar with those?

A. Yes.

Q. Will you describe those buildings to us?

A. They are two buildings, Jefferson Courts, totaling 84 units. 84 units in the total project with 2 buildings.

Q. How far apart are those buildings?

A. It is u-shaped so that actually the ends of the two buildings are probably 40 feet apart. There is a center court.

(Testimony of Lela Hall.)

Q. Are there any public streets through that project?

A. There is no public street through Jefferson Courts.

Q. There is no public street through E & E either—I mean, between the buildings? A. No.

Q. Now, Jefferson Courts, is the metering done the same way there in those apartment buildings as it is with Panoramic View and Richardson Vista?

A. Yes.

Q. And the bills are not combined? A. No.

Q. I mean, are not consolidated.

A. All the bills come to us on one bill but they are separately metered.

Q. In other words, all the kilowatt hours aren't added together to give you one rate?

A. No, sir. [171]

Mr. Hellenthal: No, sir; was that the answer?

A. That is right.

Q. They are not added together?

A. That is right.

Q. They are precisely the same way as with Richardson Vista and Panoramic View?

A. Yes, sir.

Q. Now, the S & S Apartments. Are you familiar with those? A. Yes.

Q. How many buildings does that have?

A. I think it is 230 units with 9 buildings.

Q. 9 buildings?

A. I believe that is correct.

Q. 230 units? A. Yes.

(Testimony of Lela Hall.)

Q. Are they individually metered for the tenants? A. Yes.

Q. The billing is just exactly like it is for Richardson Vista and Panoramic View?

A. As far as metering is concerned, yes.

Q. Metering and billing also.

The Court: I am just wondering why the parties couldn't agree that these other projects are handled——

Mr. Hellenthal: Your Honor, I have difficulty in hearing.

The Court: I say, I don't see why the parties can't agree [172] that all these apartment house projects are, so far as billing is concerned, handled in the same way. Why do we have to adduce testimony on that point?

Mr. Rader: Well, what about Linda Arms?

Mr. Hellenthal: What about it?

Mr. Rader: Do you agree it is handled the same way as Panoramic View and Richardson Vista?

Mr. Hellenthal: In regard to what?

Mr. Rader: Well, can you think of any difference? Let's put it like that.

The Court: As far as billing for electric current is concerned.

Mr. Hellenthal: No, I believe that I can stipulate as Mrs. Hall testified that at least during recent years a bill was submitted.

Mr. Rader: I think it would be quicker to get it from the witness, your Honor.

Mr. Hellenthal: Frankly, I do too.

(Testimony of Lela Hall.)

Mr. Reischling: I don't know anything about Linda and Hollywood, but I will stipulate that—if the witness testifies that Hollywood and Linda and the rest of them are billed in exactly the same way as Panoramic View is billed that is all right with me.

The Court: Your stipulation depends on the testimony.

Mr. Reischling: I don't know anything about Linda. I [173] have no interest in those places and know nothing about them.

Mr. Hellenthal: I can make a stipulation, but I doubt if I can do it on my feet here, but I am certainly willing to stipulate about the facts of the billing to all the projects.

The Court: That they are billed the same way.

Mr. Hellenthal: There has been a change during the time covered in this lawsuit and for—well, we will take as an illustration Panoramic View, up until 1954 it was billed through Anchorage Rental Service.

The Court: I don't mean as to the formality of billing. I mean as to the billing for consumption.

Mr. Hellenthal: In recent years the total consumption of the project has been put on one billing and the meter reading of each meter on the same billing and down at the bottom is a total amount charged. Am I not correct?

A. That is right.

Mr. Hellenthal: And I will so stipulate. We can put a typical billing in evidence if you would care to. We have them here.

(Testimony of Lela Hall.)

The Court: I don't think it is necessary to encumber the record. If you can agree it would be unnecessary to elicit the information from the witness.

Mr. Cottis: Your Honor, is it clear to your Honor that these matters that Mr. Rader is going into are groups of buildings that were erected long after the plaintiffs here and that if [174] Mr. Rader is trying to establish policy he is not establishing policy at the time Mrs. Hall's direct testimony was related to, but at a subsequent time.

The Court: No, that isn't clear to me. I assumed that he was examining the witness for the purpose of showing that at the time she was having these discussions with the City officials that she knew that the arrangement, so far as billing is concerned, was the same for all these other places.

Mr. Hellenthal: They weren't even built.

Mr. Rader: I don't know when they were built. When was E & E Apartments built?

Mr. Hellenthal: Your Honor, now I object to this as going beyond the scope of the direct. This is part of the plaintiff's case and I don't think it can be proved on cross-examination.

The Court: Well, of course, the question is not so much now whether it is a part of the defendant's case * * * it could be said that it is a part of the defendant's case, but if it is proper cross-examination then the fact that it is incidental would tend to prove his case doesn't make it improper cross-examination. That is the only question before the

(Testimony of Lela Hall.)

court, whether it is improper cross-examination and it would seem to me that unless these other apartments were constructed about the same time or not very long afterwards so that the witness here could be chargeable with knowledge of the method of billing or would be presumed to know that the method of billing these other places that were essentially the [175] same so far as construction of layout is concerned, why, it would, of course, affect or tend to affect her credibility perhaps and for that reason it would be a proper subject of inquiry. But if they were built so far subsequently that they couldn't have influenced her in her discussions with the representatives of the City it would certainly not be within the scope of the direct examination.

Mr. Rader: If it please the court, I don't know when these buildings were built, but assuming they were all built afterwards—they may have been, I don't know—she testified on direct examination that they were being discriminated against and the City wasn't treating them like they were the other owners, apartment owners in the City.

The Court: Well, if that is the testimony the objection will be overruled. I didn't recall it.

Mr. Rader: It goes to the complete time of the lawsuit.

The Court: Objection overruled.

Q. (By Mr. Rader): When were the E & E Apartments constructed, do you know?

Mr. Reischling: Just for the record that was not

(Testimony of Lela Hall.)

the testimony of Mrs. Lela Hall and the record will bear me out. She could not possibly have discussed other places that were not even yet in existence and weren't in existence until more than a year after.

The Court: It isn't whether she mentioned these other [176] buildings by name; it is whether she by general or other testimony intimated that the plaintiffs were being discriminated against. Now, if she has testified in such tenor then it would be proper to examine her in this fashion for the purpose of attempting to affect her credibility on that point.

Mr. Rader: It is my recollection she so testified. I could be in error.

Q. (By Mr. Rader): Could you tell us when the E & E Apartments were constructed?

A. The responsibility of the buildings came over to me on completion of occupancy, and occupancy of the E & E Apartments, if I remember correctly, was in December of '53. I could check files and check it for sure.

Q. How about the Jefferson Courts?

A. Jefferson Court was prior to E & E. Jefferson Court occupancy was about, I would say a year prior, 6 months to a year. The first initial occupancy was Richardson Vista then a portion of Panoramic View then Jefferson Court then——

Q. So Jefferson Court was being occupied at the same time as Panoramic View and Richardson Vista?

A. No, we completed occupancy before construc-

(Testimony of Lela Hall.)

tion—it was in December, I believe. It was some time later.

Q. December of what year, 1951?

A. No, it wouldn't be '51.

Q. Are you able to recall? [177]

A. December was initial occupancy and I believe it would be '52.

Q. How about Hollywood Vista?

A. Hollywood Vista was the last of the completed units and didn't come in until '53.

Q. They were not occupied until '53?

A. No.

Q. And S & S Apartments?

A. S & S was concurrent with E & E.

Q. Linda Arms? A. After S & S.

Q. How much after? A. 2 or 3 months.

Q. When would that be?

A. Well, let's see. You see, we would get one building and then another building. What you want is the completed dates of occupancy?

Q. I would like to know the initial dates of occupancy, when you started receiving bills from the City of Anchorage?

A. May I make a telephone call and get it for the record as long as you want specific dates?

Mr. Hellenthal: Just say you don't know.

Q. You can supply the dates?

A. Yes, they are all on file.

Q. Now, Linda Arms I believe you stated was similar to the other projects we have been [178] discussing? A. Yes.

(Testimony of Lela Hall.)

Q. And it is treated precisely as Panoramic View and Richardson Vista? A. Yes.

Q. That is, so far as billing is concerned?

A. Yes.

Q. Do you know of any other similar housing projects in the City of Anchorage?

A. I do not.

Q. That is served by the City of Anchorage?

A. I do not.

Q. Are you familiar with the Alaska Housing Project out on "I" Street?

A. That is not similar. That is a low-rent development and is a governmental agency.

Q. Are you familiar with the billing on that?

A. No, I am not.

Q. Do you know of any apartment buildings where the buildings are separated and where the City of Anchorage combines meter readings where they have separate meters?

A. I can't reply as to what the City of Anchorage does on other billings.

Q. I am asking you if you know of any?

A. I don't know of any.

Q. On these utility deposits which you gave the City of Anchorage, [179] do you know how those were computed?

A. You mean the amount of deposit determined?

Q. Yes.

A. The amount was determined by the City council.

(Testimony of Lela Hall.)

Q. Well, to determine the amount of your utility deposit—let me ask you this: How much was it, did you say?

A. The initial payment was \$7,000.00 in cash.

Q. For what?

A. For utility deposit for the management agency representing Richardson Vista and Panoramic View.

Q. For both projects? A. Right.

Q. Do you know how that \$7,000.00 was computed?

A. Well, I think you should tell me how it is computed.

Q. I am asking you if you know?

A. It was an estimate of twice the monthly billing.

Q. That was computed on the basis of each building as it was cut in?

A. No, not that. It was just estimated that our monthly billings would be \$3,500.00 per development and it was twice that for the two developments.

Q. For the total combined billing for the two projects would be \$3,500.00?

A. They established twice that.

Q. That is all you know about it? [180]

A. Do you have another question you want to ask?

Q. Do you know anything else about it?

A. I don't know what you are referring to.

(Testimony of Lela Hall.)

Q. The way it was computed?

A. I only know we were directed to present that amount of money.

Q. How about when you had partial occupancy?

A. What do you mean?

Q. Well, when you had one building occupied what was your utility deposit then?

A. The first request for utility deposits came in while we were completing initial occupancy on the two developments and the lag period between the deposit and the time that was completed wouldn't have been more than a month and a half, the major portion.

Q. I see.

Mr. Rader: I believe that is all.

Redirect Examination

By Mr. Hellenthal:

Q. Mrs. Hall, were you not directed by the City to furnish the \$7,000.00 utility deposit?

A. Yes, sir.

Q. When you said you were directed you meant you were directed [181] by the City Clerk-Treasurer, not by any of your principals?

A. No, it was the City Clerk-Treasurer that requested it, and named the amount.

Q. Now, I hand you, Mrs. Hall, Plaintiff's Exhibit No. 3. Will you please look at this exhibit, which is a City of Anchorage Topographic Map

(Testimony of Lela Hall.)

prepared for them by the Ryall Engineering Company and will you please take my fountain pen and draw a circle as to where the E & E project, that you were asked about on cross-examination, is located?

A. Here is Ship Creek and it is just up the street from Ship Creek.

Q. Do you see the 3 buildings on the map?

A. Yes, there are 3 buildings in one location.

Q. Then will you put a little circle around those 3 buildings?

(Witness so designated on the map.)

Then draw a line out to the white portion of the map and put down "E & E, Inc."

(Witness so designated on the map.)

Mr. Rader: I don't see any need for this witness to do that. I am not going to argue about the location. If counsel wants to draw them in we can stipulate to the location.

Mr. Hellenthal: Fine. We can do that later on the map.

The Court: I think his suggestion contemplates it being done outside of court hours.

Mr. Hellenthal: Yes, and we can then use it for exhibit purposes. [182]

Mr. Rader: There has never been any argument on the location.

Mr. Hellenthal: I think this is the quickest way of doing it.

(Testimony of Lela Hall.)

Q. (By Mr. Hellenthal): Up until 1954 you, as the managing agent of the Anchorage Rental Service, managed the apartment projects known as Panoramic View, Richardson Vista, Hollywood, E & E, Linda Arms, S & S, and Jefferson Courts, did you not? A. That is correct.

Q. Were the affairs of these corporations with the exception of Panoramic View corporation managed by a common board of directors?

A. Yes.

Q. Up until 1954? A. Yes.

Q. Were the stockholders identical, or do you know? A. In the major portion, yes.

Q. They were identical? A. Yes.

Q. In other words, they were owned in common by a group of investors? A. Right.

Q. Now, Mrs. Hall, I believe that you testified about minutes or notes being taken of conversations that you had with the [183] City Manager. When you referred to minutes in your testimony what did you mean?

A. As I tried to explain, it was the practice—my assistant manager often went with me and it was a question of taking notes for a check list on a work list, actually is what we did and it was a common practice.

Q. And I believe you testified that to the best of your recollection Mr. Sharp, the City Manager, may have taken notes either directly himself or through his secretary at these same meetings?

A. That is correct.

(Testimony of Lela Hall.)

Q. Now, as far as any notes that you or your assistant manager may have taken where would they be now?

A. I have no idea that they might even be in existence or not because they were actually work check lists.

Q. Do you customarily save those?

A. Not as a practice, no.

Q. Now, you used the word "Code 55" in response to some questions on cross-examination. Did you use the word "Code 55" interchangeably with the word "Ordinance 55" of the City of Anchorage or what did you mean by Code 55?

A. I think I probably was referring to the ordinance rather than code.

Q. Were you aware of any policy of the City of Anchorage that might or might not have been in existence in 1951 at the time [184] Richardson Vista project and Panoramic View project were occupied that might be contrary to the published tariffs of the City of Anchorage relating to rates for electrical service?

A. No, I knew of no policy.

Q. At the sake of possibly having touched on this earlier, were the apartment buildings in Panoramic View project and Richardson Vista project uniform?

A. Yes.

Q. Were the apartments within the apartment buildings uniform?

A. Yes.

Q. Would the apartments in Building 19 of Richardson Vista or Panoramic View be comparable—

A. 19 is Richardson Vista.

(Testimony of Lela Hall.)

Q. —19 of Richardson Vista be comparable to, say, Buildings 1 or 2 or 3 of Panoramic View?

A. Buildings 20, 21 and 22 of Panoramic View is identical or comparable to the buildings.

Q. In other words, the apartment units in these 14 plus 19 buildings were identical?

A. That is correct.

Q. And they were rented by their respective corporations to tenants? A. That is correct.

Q. Now, of course, priority, pursuant to your lease with the [185] Interior Department, was given in Panoramic View to Interior Department employees, is that not correct?

A. The only difference between Richardson Vista and Panoramic View is the priority schedule set up.

The Court: Now is that going to be material here, who was given priority?

Mr. Hellenthal: It may not be. That was the only question I asked on that.

Q. Rentals were fixed by F.H.A. for both projects? A. That is correct.

Q. At all times from '51 up until '54?

A. Yes.

Q. Tenant rentals? A. That is correct.

Mr. Hellenthal: I have nothing further.

Recross-Examination

By Mr. Rader:

Q. Mrs. Hall, you state that—first let me ask you, aren't each of these apartment units, E & E, Jefferson Courts, Linda Arms, S & S, Alaska Housing, Panoramic View and Richardson Vista owned by private corporations?

(Testimony of Lela Hall.)

A. You tossed in Alaska Housing Corporation and—— [186]

Q. I am talking about ownership of the projects.

A. I had better answer you this way: That I terminated with the beginning of the taking over the Alaska Housing Corporation and they should answer their financial structure.

Q. I think you testified, did you, that they were all managed by a common board of directors?

A. I testified in relationship to 1951, initial occupancy until the sale. The Alaska Housing Corporation is a separate corporation.

Q. Let's forget about Alaska Housing. Let's talk about the rest of them. They are all owned by——

A. They are individual corporations.

Q. Individual corporations?

A. That is correct.

Q. In other words, there is E & E Corporation, Jefferson Court Corporation, and Hollywood Vista Corporation? A. That is correct.

Q. They have always been that way?

A. That is correct.

Q. As far as you know?

A. That is correct.

Q. Although they had all interlocking directors or common board of directors, as you put it——

A. The same individuals have an interest in all of those developments. [187]

Mr. Rader: That is all.

(Testimony of Lela Hall.)

Mr. Reischling: May I ask a question? Do you mean to say that the directors, all of the directors of Panoramic View had an interest in Hollywood?

A. No, he did not mention Panoramic View. He said all of them had interlocking directors, and correct me if I am wrong, E & E, S & S, Linda, Hollywood, but you did not mention Panoramic View in that group.

Q. (By Mr. Rader): How about Panoramic View? A. Panoramic View is different.

Q. It has been different all along? A. No.

Q. It was different at one time or it is different now?

A. It is different now and it has been different over a period of time.

Q. You mean it hasn't had the same stockholders and board of directors? A. No, sir.

Q. Were they ever the same? A. No.

Mr. Rader: That is all.

Mr. Hellenthal: That will be all, Mrs. Hall. You may step down now.

(Thereupon, the witness was excused and left the stand.) [188]

Mr. Hellenthal: Mr. Herman Sarno.

HERMAN B. SARNO

called as a witness for and on behalf of the plaintiffs and, being first duly sworn, testifies as follows on

Direct Examination

By Mr. Cottis:

Q. Would you state your name?

A. Herman B. Sarno, S-a-r-n-o.

Q. Where do you reside?

A. Long Beach, Long Island.

Q. You are up here in connection with this litigation?

A. Well, among other things.

Q. Can you give us some idea of your occupation, Mr. Sarno?

A. I am an attorney.

Q. And are you also in the housing and hotel business?

A. Yes, I am the president of the Alaska Housing Corporation and of the E & E, S & S, Linda Arms, Jefferson and Hollywood and Richardson corporations mentioned here today.

Q. When did you acquire your interest in these various corporations?

A. As of March 1, 1954.

Q. Mr. Sarno, did you receive last July, that is, July of 1954, a letter from Mr. McKinley, the City Electrical Superintendent?

A. I don't believe I ever received a letter from him. I [189] received from him a copy of a letter that he wrote.

Q. Where is the original of that letter? Do you know?

(Testimony of Herman B. Sarno.)

A. Well, the original was sent to the National Fire Protection Association which is, as I understand, a subsidiary of the National Board of Fire Underwriters.

Q. I am speaking of a letter addressed to the Alaska Housing Corporation.

A. That was in October.

Q. Correct. Now, do you have the original of that October letter addressed to the Alaska Housing Corporation?

A. No, I do not. I have a copy that was made by our office here in Anchorage. The original I mislaid in my office.

Q. In New York? A. Yes.

Q. Do you have the copy with you?

A. Yes, I do.

Q. Was that made in the normal course of business by your Anchorage Office?

A. Yes. This letter actually was addressed to the Alaska Housing Corporation and sent to 1308 Hollywood Drive, Attention, Mr. Harlan, our general manager in Anchorage. Mr. Harlan, as his custom, made and retained a copy for his office and sent me the original.

Q. May I have the copy, Mr. Sarno?

Mr. Cottis: I offer it in evidence. [190]

Mr. Rader: No objection.

Q. Before you received that letter, Mr. Sarno, had you had any discussions at Anchorage with Mr. McKinley, the Electrical Superintendent for the City of Anchorage, with respect to their method of billing various apartment projects?

(Testimony of Herman B. Sarno.)

A. Yes, I have had a discussion with the City Manager, with the City council, with Mr. Rader and with Mr. McKinley and I will say that the discussions have all been very amicable in the spirit of the greatest co-operation.

Q. In any of those discussions has the National Electrical Code been mentioned? A. Yes.

Q. Will you relate that discussion as nearly as you can remember it?

A. With the court's permission I would like to give a little history of this, if I may, and I will stop when directed.

Mr. Cottis: Certainly.

The Court: Well, only that much of the history should be given as is necessary to understand what he will testify to.

Q. Will you give us the background of these discussions?

A. When we acquired these properties there were several pieces of litigation involving these companies and the City of Anchorage. In a meeting with the City council I evinced my interest in disposing of all litigation, asserting that we did not like to be suing anybody especially the City of which [191] we were doing business and after a long discussion was had with the City council, as a result of which I was referred to Mr. McKinley and Mr. Rader. I said at the City council meeting that night that in this particular litigation that is pending now we had not commenced it and did not desire it to be continued if it could be adjusted on an

(Testimony of Herman B. Sarno.)

amicable basis and get these rates straightened out. I said that I had read the briefs prepared by your office and had an independent analysis made of the law as we interpreted it and we thought the City was clearly in the wrong from all the information we had, but we were, nevertheless, not insistent.

Mr. Rader: If it please the court, it is an interesting story, but I don't think it is material—what he has said so far.

Mr. Cottis: This is the discussion, if your Honor please.

A. I initiated the conversation between myself and Mr. McKinley. As a result of this conversation with the City council I was referred to Mr. McKinley.

The Court: I can't tell whether this is material and relevant until he tells it all. Nobody has made any statement of what is going to be proved by this witness or to what these questions are directed so I am unable to pass on it. I just assume that it is not going to be irrelevant and immaterial, [192] otherwise, I don't think you are doing your job right.

Mr. Cottis: I don't expect it to be irrelevant, your Honor.

A. May I continue then, your Honor?

The Court: Yes.

A. I said to the City council that I thought that the plaintiff in this action was so clearly right that I could not understand why the litigation was permitted to continue and that I was not interested in

(Testimony of Herman B. Sarno.)

obtaining a large money judgment against the City of Anchorage and would have no keen pleasure in collecting it; that I would like the litigation settled expeditiously and fairly and get these rates adjusted on a fair and decent basis; that we were operating in many cities in the United States, projects of this kind, where uniformly we had combined billing for units of this type and that a vast majority of stateside housing of this garden type character was always permitted combined billing.

Q. What was Mr. McKinley's reply?

A. That was before I spoke to Mr. McKinley. This was at the meeting of the City council and the City council thought my position was fair and I offered to give to the City attorney all of the legal memoranda and all the factual matter we had for their examination and for them to decide—they would have our case in advance—and if they felt that we were right about it we would proceed further and if they felt we were [193] wrong nobody would be harmed and at least they would know everything of what we thought about in our theory in the matter. They welcomed that. They asked us to give that memoranda to Mr. Rader, so I did. Thereafter, Mr. Rader caused a meeting to be held between he and Mr. McKinley and I. Mr. McKinley seemed to want to be co-operative and to get us a lower rate schedule and it was apparent to me that the injustice of having to consider each building as a separate customen when all owned by one corporation, the absurdity was apparent, and they

(Testimony of Herman B. Sarno.)

wanted to straighten out the situation. Mr. McKinley was very much concerned that this could not be done because it would violate the Underwriters Code. He pointed to a section which he said would cause great difficulty in getting the thing straightened out. Mr. Rader and I did not agree that his interpretation of what the meaning of the word in the Underwriters Code meant and accordingly it was agreed that Mr. McKinley would write a letter to the Underwriters to ask whether there was any prohibition in a certain line of rewiring contemplated and he so wrote the letter and sent me a copy and he got an answer.

Q. Did he send you a copy of the answer?

A. No, I have never gotten a copy of the answer.

Q. The letter of July 19 from the City of Anchorage, Mr. Sarno, that they were good enough to send you a copy of, was it written to the National Board of Fire Underwriters?

A. My letter says, "National Fire Protection Association," which I [194] understand is a subsidiary of the National Board of Fire Underwriters.

Q. And that letter was written with the approval of both the defendant, City of Anchorage, and the plaintiff, Richardson Vista Corporation?

A. Well, I guess that is substantially correct. I did not see the letter before it was sent. It was agreed that such a letter of the general character of this should be sent.

Mr. Cottis: Your Honor, yesterday at the pre-trial conference the letter from the City to the

(Testimony of Herman B. Sarno.)

National Fire Protection Association, which is the compiler of the National Electrical Code, and their reply to that letter, were reflected as being admissible. I should like to reoffer them on the basis of Mr. Sarno's testimony that the letter was initially written at the request of both parties and the reply to that letter was never made available to Mr. Sarno.

The Court: Well, I have the same doubts about the admissibility that I had then. All it represents, as I see it, is an effort on the part of Mr. McKinley to find support or precedent in his position. Now, the fact that he failed to obtain precedent or support does not make it admissible.

Mr. Cottis: It was in the nature, your Honor, of an agreement between the two parties on this dispute to say, well, let's write to the National Electrical——

The Court: There isn't anything here to show that there [195] was an agreement to abide by the reply to that letter.

Mr. Cottis: I grant that, but inferentially that could be drawn.

The Court: I think it amounts to no more than a failure on the part of the City to find support for its position.

Mr. Hellenthal: It is proof, your Honor, that the City has, as late as '54, persisted in its position that the National Electrical Code——

The Court: Suppose he did and suppose it was mistaken, that doesn't——

(Testimony of Herman B. Sarno.)

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The Court: Suppose he did and suppose it was mistaken, that doesn't——

(Testimony of Herman B. Sarno.)

Mr. Hellenthal: We must prove that. It has been conceded here.

The Court: But I have held and I hold now it is immaterial. The fact that somebody finds no support for his position doesn't mean that his position is wrong or that he has to abandon it.

Mr. Reischling: It is inconsistent with the position taken by the City in the trial of this case. It was the practice or policy of this city.

The Court: This might tend to rebut that if they have said it. I don't know. They haven't introduced any evidence. If they do, it might become admissible in rebuttal.

Mr. Reischling: It is my understanding it was an attempt to show it wasn't the policy. I objected this morning to which the court overruled the objection and permitted it to go ahead. Now I say that the theory used in the courtroom today and [196] late yesterday is inconsistent with the theory which they had expressed to the representatives of both plaintiff corporations which this particular exhibit will tend to establish and to confirm.

The Court: I don't see anything inconsistent between the policy that the City had and the fact that it didn't find support for its policy somewhere else.

Mr. Rader: If it please the court, we admit what Mr. Sarno testifies to here as to the conversation about the National Electrical Code. We are not contesting that. That is the first time it ever came up to our knowledge.

(Testimony of Herman B. Sarno.)

The Court: The ruling made yesterday is adhered to.

Mr. Cottis: I am sorry, I didn't hear.

The Court: I say, the ruling made yesterday is adhered to. It is immaterial.

Mr. Cottis: Even to show it is offered, not for its contents, but to show this new theory of the City that they had a policy right along against combined billing?

The Court: How could it possibly do that? As I pointed out a minute ago, the existence of a policy on the part of the City could not be negated by something that somebody else disagreed with.

Mr. Cottis: Your Honor, I realize you have not read these exhibits, but I would like at this time to read a portion of [197] Plaintiff's Exhibit 4 which is a letter from the City of Anchorage Superintendent of its Electrical Department, dated October 11.

The Court: Is this the letter to which reference has just been made?

Mr. Cottis: No, this is one which has been admitted. The letter, I may state, goes into this situation and is completely silent on being contrary to the City's policy and it ends up with these two paragraphs, "If the proposal of combination billing were pursued under the new rate structure the following estimated billing would indicate the cost of December, 1953, power"—and then it gives the dollars and cents figures—"therefore, it is our advice

(Testimony of Herman B. Sarno.)

to leave the circuits as they now exist and take full advantage of the new rates." My point is, your Honor, that the City, through our witness, Mrs. Hall, has tried to leave some innuendo that they had had a policy right along against combined billing. Now, we have two documents, two admissions by the City, one of last October which has been admitted and the other one of last July which we are trying to get admitted, which negative their claim because in neither of those letters did they say a thing about it being contrary to their policy. They say in one letter, "It is better for you financially to leave it alone," and in the other one they say, "It is against the National Electrical Code."

The Court: May I see that letter?

Mr. Cottis: I wonder if the court could examine the [198] one they are offering in evidence that has been rejected.

The Court: Well, I think that has been sufficiently described so I need not examine it. I don't think I recall your argument now as to this particular exhibit. Will you repeat it?

Mr. Cottis: You mean when this exhibit was admitted?

The Court: Well, whatever you said a moment ago about this exhibit.

Mr. Cottis: This exhibit of only a few months ago goes into the subject and doesn't say a word about combined billing being contrary to the City's long established policy. Now, Mr. Rader, through this exhibit, which is the minutes of the council

(Testimony of Herman B. Sarno.)

meeting, and through his cross-examination of Lela Hall, has tried to leave forth some evidence that the City has had an established practice and policy against combined billing. The exhibit that your Honor has before you and the one that we would like to get in both relate intimately to this very problem and neither of them say a word about it being against the established practice of the City or against the policy of the City. We don't offer them for the truth of their contents, or at least the July letter we don't offer it as expert opinion evidence on whether the code does or doesn't apply, we offer it simply to say that as recently as July, 1954, the City hadn't dreamed up this policy they are now relying on. At that time they were still relying on the National Electrical Code. Possibly it will be better in rebuttal but because of the admission of exhibits during [199] the pre-trial conference and particularly because of the admission of the City council minutes, which does refer to an established practice on the part of the City, I thought it would expedite matters to rebut those minutes and rebut what Mr. Rader tried to elicit from Mrs. Hall with respect to some fictitious policy by producing these July letters of last summer.

The Court: It is incompetent for the purpose. It will be excluded.

Mr. Reischling: May it please the court, I know that ordinarily it is unnecessary to accept a matter of this kind because of the rule, but where the document that has been offered has not been marked for

(Testimony of Herman B. Sarno.)

identification and the record, therefore, cannot show to what the ruling referred I now ask the court to permit that rejected document to be marked for identification and that the Clerk will show that the document was offered and refused so that I may except to the ruling of the court.

The Court: You may have it so marked.

Mr. Reischling: Thank you, your Honor.

The Court: We will recess now for 10 minutes.

(Whereupon, at 3:10 o'clock p.m., following a 10-minute recess, court reconvenes, and the following proceedings were had.)

Mr. Hellenthal: Your Honor, the City has examined Plaintiff's Exhibit No. 3, which has been marked to show the location of various housing projects, and they are in agreement [200] that the exhibit as marked is a true portrayal of the location. We have in court, your Honor, the Electrical Superintendent of the City of Anchorage and he has produced all of the approved electrical plans for Panoramic View and Richardson Vista in response to our subpoena and we will leave them on the table here for inspection by the City.

Mr. Rader: I want to know if there is any more that you are going to claim or that you know of?

Mr. Hellenthal: The construction company might have some, but we know of no more.

Mr. Rader: All right.

Mr. Hellenthal: We have no further questions of Mr. Sarno.

(Testimony of Herman B. Sarno.)

Cross-Examination

By Mr. Rader:

Q. Mr. Sarno, I believe you mentioned that you owned quite a number of projects in the states?

A. That is correct.

Q. Apartment houses? A. Yes, sir.

Q. Different buildings on the same plot of ground?

A. Yes, a number of multi-story and garden type—various types. [201]

Q. Do you have any of the same type as Panoramic View or Richardson Vista? A. Yes.

Q. Where are those located?

A. McGill Village, Pulaski, Virginia.

Q. Pulaski, Virginia. How many buildings does that have? A. That has 75.

Q. How many apartments in each building?

A. Two.

Q. Duplexes? A. Well, they are one story.

Q. Just two apartments in each building?

A. Yes.

Q. Do you have a house meter on each one of those?

A. Well, we don't pay for the electricity on those meters because the tenants pay their own electricity.

Q. There is no house meters on those then?

A. No, but we have the house meter for our own office building and we have a number of street lights, very substantial number of street lights and we buy

(Testimony of Herman B. Sarno.)

that electricity from the power company there and that is metered as one unit.

Q. Your street lights? A. Yes.

Q. Now, Mr. Sarno, I want to ask you again if you have any projects which are similar to Panoramic View and Richardson Vista [202] in the states?

A. Well, we don't have any that have as many units in each building as Panoramic View or Richardson Vista.

Q. Tell me the ones you have that are closest to it.

A. Kenwood Garden in Toledo, Ohio, they are 7-family buildings.

Q. Toledo, Ohio? A. Yes.

Q. 7-family dwellings? A. Yes.

Q. Do you have a utility room in each of those buildings? A. Yes.

Q. How many buildings are there? A. 72.

Q. One-story buildings? A. Two.

Q. Do the tenants pay for their own electricity?

A. Yes, sir.

Q. Do you have a house meter? A. Yes.

Q. On each building?

A. I am not sure whether that is one central point or whether there is a house meter at Kenwood.

Q. You don't know then whether you have primary metering or individual metering for those 72 buildings?

A. My recollection is that whichever kind we have we are getting [203] combined billing. The rate

(Testimony of Herman B. Sarno.)

goes all the way down. We don't pay for each building as if it belonged to a separate owner. It is all on one tract like these buildings.

Q. Then you must have 72 meters if it is like these buildings?

A. It is like these buildings in the respect it is 72 individual buildings and not one multi-story building and it is on extended land area and 2-story garden type buildings.

Q. Do you have 72 meters or one meter?

A. I can't be very certain.

Q. You don't know? A. I don't know.

Q. All right. I want to ask you, is there a meter in each of the tenant's apartments? A. Yes.

Q. They pay their own?

A. Well, the meter, I think, is in the basement.

Q. I mean the meters for each tenant?

A. Yes, there is a meter for each tenant.

Q. Who owns the distribution facilities, outside distribution facilities?

A. It is not the City of Toledo. It is a private power company.

Q. Do you know the name of that company?

A. I think it is Ohio-Edison, but I am not certain.

Q. You are unable to say though whether or not they combine the house meters, combine the readings or whether you have [204] one primary meter which serves all of the houses? A. No, I am not.

Q. Do you have any other similar situations?

A. No.

(Testimony of Herman B. Sarno.)

Q. You don't have any others?

A. No. We have in Georgia and South Carolina relatively the same situation in that we have motels which are separate buildings and they are separated from each other and we get one rate. The rate goes all the way down the line.

Q. That is transient, isn't it, hotels and motels?

A. Well, as distinguished from this there are no tenants paying their own electricity. We pay the whole bill.

Q. I see. Is that on one meter? A. Yes.

Q. One meter for the whole project?

A. That is correct.

Q. Mr. Sarno, this idea of putting in your own wiring and connecting up the houses with your own wiring system, wasn't that your idea?

A. Where do you mean, Mr. Rader?

Q. Up here on Richardson Vista?

A. You mean connecting—was it my idea to do it?

Q. Well, what were the proposals that you put to Mr. McKinley?

A. I inquired why we couldn't get—I don't know what the word is, but a rate so that we could get the benefit of [205] volume consumption, why each one of these buildings were treated as if it were separately owned and a separate customer when it was a one-company ownership. I didn't request that we get combined billing for all the companies, but for each corporate entity and the problem arose as to

(Testimony of Herman B. Sarno.)

how it could be done. I said, "If there is any way we can do it that, even if it involved some expense to us, if the expense isn't out of line, tremendously out of line with the saving, we will be glad to do it." Mr. McKinley said, "There is no way." And thereupon we got our own engineer and had him make a study and he said, "There is a way."

Q. What way did he determine to be a way?

A. He said if the City would permit us to have a central meter that if that could be done that we could wire all the buildings together and have two services into each building. Mr. McKinley said that couldn't be done, that that violated the code. Thereupon, I had the conference with you and you called Mr. McKinley in and Mr. McKinley again repeated his objections and his interpretation of the electrical code and, as you will recall, neither one of us agreed to it and that is when we thought there should be an interpretation. That is why we got the letter.

Q. Mr. Sarno, your engineers were the first ones to come up with the possibility of putting two services to a building instead of one, weren't they? [206]

Mr. Cottis: Objection, your Honor, on the ground it is obviously outside the scope of this witness' knowledge. He doesn't know what went on in 1951.

Mr. Rader: If it please the court—excuse me, counselor.

Mr. Cottis: And it would be hearsay.

Mr. Rader: If it please the court, now the only reason this is important is for this reason: That Mr. Sarno and his engineers were the first people

(Testimony of Herman B. Sarno.)

who brought up this possibility of two services to one building and that is the first time that the National Electrical Code, so far as we are aware of, was ever mentioned and it was last summer and the National Electrical Code has bearing on that and has bearing on none of the rest of this.

The Court: The objection is overruled. You may answer.

Q. Your engineers are the ones that came up with the idea of two services, aren't they?

A. No, that isn't so. I was told by Lela Hall that—this was long before the institution of the lawsuit when they were talking to the City Manager before the controversy arose—the City Manager said, “Well, it can be done. There is no need for it. You can accomplish it by billing. Why should you spend the money.” Having that in mind we approached Mr. McKinley hours after I had been to the City council and made the proposal. The City council was amenable, apparently [207] amenable, and they said to consult with Mr. McKinley and try to work out something. We then said, “If nothing else let us do this,” and Mr. McKinley said, “It can't be done. It violates the code.” Then we got our own engineers and they said it could be done, that McKinley was wrong. I again sought a conference with you to get it clarified. We were willing to do it. Mr. McKinley then agreed it could be done legally and that the code didn't bar it. Mr. McKinley gave us some figures that seemed to make it

(Testimony of Herman B. Sarno.)

impossible and those figures, on recheck, we found where he was a little pessimistic about the price we could get it done for.

Mr. Rader: If it please the court, will you instruct the witness to just answer the questions. He is an attorney and ought to know he shouldn't do that. It may be correct, but I have a purpose in mind when I ask a question.

A. I am sorry, Mr. Rader. I will co-operate.

Q. Now, when you came up with this idea of two services or when your engineers said it was feasible and it could be done they threw the National Electrical Code at you, is that correct?

A. I am sorry, I don't understand your question.

Q. In other words, Mr. McKinley said, "No, we can't do that because of the National Electrical Code"? A. That is correct.

Q. Now, you had conversations as to why. What were the conversations [208] as to why the meter readings weren't merely combined, leaving the wiring as it is? What were those conversations?

A. Mr. McKinley said—it was obvious, the City refused to do it. That is why the lawsuit was pending.

Q. Now, wait a minute. He didn't say anything about the National Electrical Code as being the reason for not doing that? A. No.

Q. The National Electrical Code has nothing to do with conjunctive billing or combined——

A. Are you asking me a question?

Q. I am asking you a question.

(Testimony of Herman B. Sarno.)

A. I don't know that it does or does not. There was never any discussion about the electrical code bearing upon combined billing which was involved.

Q. And you discussed you wanted combined billing, didn't you?

A. It was the reason the lawsuit was pending and that is the crux of the matter. Briefs had been prepared. Of course, I wanted it.

Q. Now, when you went to Mr. McKinley and the City people and asked for combined billing, what did they tell you about that?

A. They said they wouldn't do it.

Q. They said they had a policy against it, didn't they?

A. No, they never. I never heard the word "policy" mentioned, ever. [209]

Q. All right. Go ahead. What did they say?

A. They said that they couldn't do it because if they did—they cited an illustration that they would have to give the Bank of Alaska with 4 or 5 branches the same privilege and I called to them that that was not the fact, that we were not like the Bank of Alaska and that we were entitled to it because our buildings were contiguous on the same piece of ground and there was a general practice followed everywhere and it did not involve the Bank of Alaska or anybody else except multiple dwellings garden type apartments which were being discriminated against in that there was no reason for Mt. McKinley or "L" Street, which was built in the air, to get combined billing and the garden type not

(Testimony of Herman B. Sarno.)

to get the combined billing.

Q. Didn't I merely ask you what Mr. McKinley said as to that——

A. That is exactly what Mr. McKinley said. He said if he gave it to us he would have to give it to everybody who had more than one unit in the City, so I said to him, it is not the same thing.

Q. I didn't ask you what you said to him. I asked you what he said to you?

A. That is what he said.

Q. All right. He said what he did for you they would have to do for everyone else and you insisted it wasn't correct, in substance? [210]

A. I repeat what I just said. It happened the way I said it. If you want to interpret what I said——

Q. Is that an incorrect interpretation?

A. No, essentially it is correct.

Q. Essentially that is what happened?

A. Correct.

Q. Didn't Mr. McKinley say, "Our policy is not to combine. If we combined them for you we would have to combine them for everybody else"?

A. Mr. Rader, the policy was never mentioned as such. I assume the way he said it that it was their policy, apparently, but the word policy was never mentioned. He said, "We can't do it for you because we would have to do it for everybody else."

Q. Now, you stated in one of your answers here awhile ago there was a general practice to combine

(Testimony of Herman B. Sarno.)

these meter readings on apartment houses located as these are, where the tenants have a meter and the house has a meter in each house. Now, I would like to have you tell me where that general practice obtains?

A. The City of New York and the District of Columbia. Let me make myself clear. In the City of New York you can have not only an apartment house, you can have 2 hotels, 3 hotels, or 15 hotels as long as they are physically contiguous, they do not even have to be owned by the same corporate entity, [211] and you get a combined rate.

Q. You mean that if John Doe owns Hotel A and Tom Smith owns Hotel B they get a combined rate for both hotels?

A. No, sir. I said if it is the same interest although not the same corporate entity. A man can own 3 hotels with 3 different corporations and if it is the same factual ownership, interrelated ownership, that primarily the test is whether it is contiguous and without ownership by a stranger, a third person.

Q. In other words, they do away with the corporate veil? A. That is correct.

Q. That is in New York? A. Yes.

Q. What company?

A. Consolidated Edison.

Q. Do they combine meter readings?

A. Yes.

Q. Under those circumstances?

A. Well, I don't—under what circumstances,

(Testimony of Herman B. Sarno.)

Mr. Rader? You mean if there are two separate corporate entities or if it was the same legal ownership?

Q. Well, you have stated it didn't make any difference, didn't you? A. Yes.

Q. Well, then answer the question. For either one of them? [212] A. Yes.

Q. They do combine meter readings?

A. My understanding is they do regardless of what corporate entity, whether separate corporate entity or the same corporate entity.

Q. It is your understanding they do?

A. Yes.

Q. You don't know——

A. Not only that, Mr. Rader, but in the Consolidated-Edison Company it is permitted to give all of the tenants their electricity and put it all in—combine all the meters for all the tenants, add those to the house meter and pay one bill predicated on the combined reading of all the tenants, including the owner of the property, in an apartment house.

Q. That is the situation with Consolidated-Edison in New York? A. That is correct.

Q. You say that is done in Washington, D. C., also?

A. My understanding is it is done in the District of Columbia. Well, you said—I don't know that they permit you to combine all the meters of tenants—what did you mean?

Q. Well, Mr. Sarno, let me put it like this to you: Assuming that your project on Government

(Testimony of Herman B. Sarno.)

Hill, Richardson Vista, were picked up and bodily set down in New York. Is it your contention——

A. You would get a combined billing. [213]

Q. They would have all of the house meters and give you the advantage of the combined rate?

A. My understanding is they would give you your choice of metering them together or if that presented extraordinary hardships in cost they would give you a combined reading and combined billing.

Q. And the same is true in Washington, D. C.?

A. I think the same is true of Washington, yes. I can check Washington for you on the phone in a few moments.

Q. Do you know where else it is true? Incidentally, what is the company in Washington, D. C., which does that?

A. I believe the name is Patomic Electric. I am not altogether certain about Washington, but my recollection is that the condition exists in Washington. But the condition is not uncommon, Mr. Rader. You know that.

Q. Let me ask you, is it your contention it is also not uncommon for utilities companies to act in precisely the same manner as the City of Anchorage? That is not uncommon either.

A. I have never known in all my experience, Mr. Rader, for any public utility to be so determined about something in which it is so unreasonable, which the City of Anchorage has been, about their litigation and about their state of facts.

Q. I am asking you if you know whether it is

(Testimony of Herman B. Sarno.)

common or not for utility companies to insist on metering in precisely the same manner the City of Anchorage has insisted on metering in [214] your case right here now?

A. I don't know anything about what the City of Anchorage insists on metering. I have never had that problem what they are insisting on being done.

Q. We insist on not combining your meter readings, don't we?

A. Yes, obviously you do. That is why we are here.

Q. You don't know of any other place that does that?

A. Well, I have never met the experience. I will say that.

Q. That is all I ask you for. Now, Mr. Sarno, this letter that Mr. McKinley wrote to you on October 11, was that before or after your engineers had worked on the same thing?

A. I believe that was after.

Q. After your engineers had worked——

A. After our engineers said—I think I have a memorandum here that will permit me to answer your question precisely.

Q. Mr. Sarno, who were your engineers?

A. What is the name, Mr. Harland? I have to ask Mr. Harland.

Mr. Harland: Mr. Erickson.

Mr. Hellenthal: I have a copy of Mr. Erickson's report.

(Testimony of Herman B. Sarno.)

Q. Mr. Sarno, I want to ask you whether or not Mr. McKinley didn't tell you about this October 11 letter when you were discussing those matters, tell you that this was a possibility and he might be able to work something out but that it would take the council's approval to do it?

A. I don't know what you mean by the October letter. [215]

Q. The October 11 letter which is Plaintiff's Exhibit No. 4. I will hand it to you.

(Thereupon, the document was handed to the witness.)

A. Incidentally, to answer what it is may I have the copy of the letter to the Underwriters. What is the date of that, please?

Mr. Cottis: It has been marked for identification.

A. We got a report from our engineers on July 3.

Q. 1954? A. Yes.

Q. And that was directed to generally 2-point service to each building and putting all of the house meters on one circuit? Is that correct?

A. Not necessarily all of them; as many as would be practical to put together. It was pointed out under the rate that it wouldn't do any good to put more than a certain amount together because the rate stopped at a certain point.

Q. So your report from your engineers was dated July, 1954?

(Testimony of Herman B. Sarno.)

A. July 3 and Mr. McKinley wrote, I believe, on July 19 and now my recollection is that you and I met with Mr. McKinley shortly after July 3 because you may recall I didn't get a copy of the letter that Mr. McKinley was supposed to write and I complained to you and asked you why I hadn't gotten a copy, did it go out. Then later the letter, apparently, did [216] go out because we got a copy.

Q. You did get a copy eventually?

A. Yes.

Q. Now, I want to ask you, when Mr. McKinley was discussing it with you didn't he say, "Perhaps this was a possibility. We will look into it and look into the fire angle then see if we can come to an agreement and take it to the council"?

A. Mr. Rader, he didn't say that, sir. You know it very well.

Q. What did he say?

A. He said he didn't think it could be done, that it violated the Underwriters code and he pointed to a section there when you were present and he said this section prohibits it, his interpretation of this section prohibits. I disagreed with that and it was agreed the letter would be written. He never at that time—prior to the writing of the letter he was very skeptical it could be done. He never suggested that it could be done. Apparently some time later he did write a letter in which he said it could be done and offered to help, but I think he pointed out it would be too costly; it wouldn't pay.

Q. He considered that a proposal that you were

(Testimony of Herman B. Sarno.)

making to the City of Anchorage to put up some of your own wiring there, didn't he?

A. I don't know what he considered.

Q. Do you think he considered it anything [217] else?

A. I don't know what he considered. He was apparently trying to help us then to get a lower dollar amount that we would pay for our current if it could be done and he was willing to be co-operative and he was willing to have it done if it didn't violate the Underwriters Code.

Q. Mr. Sarno, is your claim of discrimination by the City of Anchorage based upon the fact that an apartment building, a single apartment building, has a single meter whether it is 14 stories high or two stories high?

A. Well, not precisely in that language but essentially that is correct. My claim is that we ought to pay the same as McKinley or any multi-story building per kilowatt hour of electricity. We buy just the same as they do and the fact we have more than one structure, instead of one, has nothing to do with it. It doesn't cost the City any more for service to us than it does to them. It would cost minutely more to read the meters. Apparently our company at the time when I had no connection to it was permitted, I understand, was promised that that would happen, that they would get the benefit of this rate and I see no reason why we should pay more than McKinley or any of the multi-story structures in this city per kilowatt hour for electricity.

(Testimony of Herman B. Sarno.)

Q. You talk about the McKinley here. That is an apartment building 14 stories high, something of that nature? A. Yes. [218]

Q. With how many units?

A. Approximately 200 I understand.

Q. 200 apartments and you are familiar with the fact that each one of those apartments has a separate meter on it that the tenant pays?

A. Yes. I am not sure, but I understand that is so.

Q. You understand that to be the fact?

A. So are ours.

Q. And you understand that in that apartment building there is one house meter?

A. I understand that, that is correct.

Q. And you understand that in each of your apartment buildings there is similarly one house meter?

A. But that seems to me to be the height of absurdity. That distinction to me is no different and it seems to be a distinction without a difference.

Q. Excuse me, Mr. Sarno, your counsel will argue your case for you. You merely answer my question. There is one house meter in the 14-story apartment building just like one house meter in every one of your apartment buildings, is that correct?

A. Yes, Mr. Rader. By the same token we have a building in E & E which has 33 units. Why does

(Testimony of Herman B. Sarno.)

E & E pay less per kilowatt hour of electricity than Panoramic View or Richardson Vista or any of the other projects? What has the size of [219] the building got to do with it? Why do we get a lower rate in E & E? In effect, we pay less per apartment per month in electricity than we pay in Richardson Vista.

The Court: You have answered the question. You shouldn't be arguing.

Q. You do admit in every one of these instances you have cited that there is one house meter for each apartment building, is that correct?

A. That is correct and it goes for E & E also.

Q. To the best of your knowledge on this project, or any other project you have mentioned here, in no instance have the meters on two different buildings been combined into one billing to give a lower rate, have there?

A. Well, I have talked about a lot of projects.

Q. I am talking about in the City of Anchorage; the projects you have mentioned in the City of Anchorage?

A. I will take them one at a time. E & E has approximately, I think, 33 apartments per building. We get the rate right down the line and we get the bottom billing. Our electricity in E & E, our own project, costs us substantially less than it does in the plaintiff companies and I see no reason for the distinction.

(Testimony of Herman B. Sarno.)

Mr. Rader: If it please the court, that isn't an answer to my question.

The Court: You better confine your answer to the question. [220]

A. I am sorry. Would you—may I have the question read, please?

(Whereupon, the reporter read Question, Line 15, Page 220.)

A. I don't know of any, no. (Pause.) Mr. Rader, are you talking about in Anchorage?

Q. I am talking about in Anchorage.

A. I don't know of any, no, sir.

Q. So far as you know the City is at least consistent in not combining meter readings for apartment buildings inside the city limits?

A. That is correct. I don't know. They may have done it. I have no knowledge, but I don't believe they have. I am not qualifying the City's consistencies. I think they are consistently wrong.

Q. So far as you know there is no basis for the discrimination on combined meter readings?

A. You mean garden type apartments?

Q. I mean the fact we don't combine meters for you is no discrimination against you because we don't do it for anyone else.

A. I have no information whether you do or don't.

Q. To the best of your information?

A. I am sure you don't. I am sure you don't

(Testimony of Herman B. Sarno.)

treat me any different from anyone else. I have no such claim.

Mr. Rader: That is all. [221]

A. That is, as far as the category refers to garden type apartments.

Mr. Rader: Pardon?

Q. You may apparently treat everybody with garden type apartments the same, but you don't treat everybody with multiple housing units the same.

Q. (By Mr. Rader): I want you to tell me what the difference is in the metering between one and the other?

A. I don't know anything about how McKinley is metered.

Q. You say we treat them differently?

A. My understanding is that McKinley gets this under the same rate schedule that we have; they combine all of their electricity used in the halls and in the public areas and gets the rate all the way down the line with the corporation. The corporate customer, whoever McKinley is, I don't know the name of it, gets treated differently than Richardson Vista or Panoramic View in that respect. We do not get the rate all the way down the line the way they do and we pay, therefore, more per apartment or per cubic foot of space, on any calculation, for electricity than they do.

Q. Now, if your apartment buildings, instead of being 2 stories high were 4 stories high—

A. I am sorry.

(Testimony of Herman B. Sarno.)

Q. Assuming your apartment buildings were 4 stories instead of [222] 2 stories high, is it your contention we should change your metering because of that?

A. No.

Q. Assuming that your apartment building was 14 stories high instead of 2 stories high, should we change your metering on that account?

A. We have not asked you to change our metering, ever.

Q. You are not contending that on your billing?

A. Your billing, yes.

Q. All right. Now, your apartment buildings are 2 stories high. If they were 3 stories high, is it your contention that we should change your billing because another story is added to them?

A. We don't ask you to change our billing in any respect. Our contention is that Richardson Vista is a corporation owning several hundred apartments consuming current, the same kind of current, on the same schedule as McKinley and the other multiple story buildings, your customers, but instead of billing our total electricity at one rate we are buying it at a substantially higher rate than you charge our competitors who are in exactly the same line of business for the same kind of electricity.

Q. How many points of delivery do we have to your corporation for house meters?

A. I assume that you have one for every [223] building.

Q. How many is that for you, then?

(Testimony of Herman B. Sarno.)

A. I believe that is 19 for Richardson Vista.

Q. 19 points of delivery? A. Yes.

Q. So to buildings that are spread on how many acres—23 acres or thereabouts?

A. Yes, I think Richardson Vista has 23 acres.

Q. Now, the Mt. McKinley that you keep talking about occupies how many acres?

A. Oh, barely an acre, I suppose.

Q. And how many points of service do we have to the Mt. McKinley apartment building? (Pause.)

We have one, don't we? A. I guess you do.

Q. One as contrasted with 33 for you?

A. No, 19.

Q. 19, excuse me. A. Yes.

Q. One on one acre as contrasted to 19 on 23 acres?

A. But that is not important, Mr. Rader, because you don't need 19 points of delivery to us. You could put one meter at one point and solve the whole problem. You don't need 19 or 9 or 2. You only need one. You could get one meter to meter every bit of electricity in those buildings, just like you do in McKinley.

Mr. Rader: That is all. [224]

Redirect Examination

By Mr. Cottis:

Q. Mr. Sarno, in connection with Mr. Rader's last question, each service drop to each one of your buildings serves 22 tenants plus the house, is that correct?

A. The City collects from each service drop, they

(Testimony of Herman B. Sarno.)

collect from 22 tenants; a lot of money at a very high rate as well as giving us the service to that building on that one drop and that one line is a tremendous advantage to them.

Q. And their rates to the tenants are domestic rates? A. Domestic rates.

Q. Now, Mr. Rader has gone pretty far in questioning you, but as I understand your answers you are not concerned with how many meters there are on your properties on Government Hill, is that right?

A. I don't think Mr. Rader has gone very far. I think he has done an excellent job and has been very fair, but—to answer the second part of your question, I don't remember what it was.

Q. You have no concern with how many meters the City wants to hang about your structures, do you? A. No.

Q. If they want to put 17 meters in each building to make your [225] house current, you don't mind, do you?

A. We might have some concern about it getting in the way, but outside of that we wouldn't.

Q. What I am getting at, all that you have contended in your discussions with Mr. McKinley and other City officials and in connection with your own engineering studies, is that you are not getting the most favorable rate that is legally available to you?

A. That is correct.

Mr. Cottis: I have no further questions.

(Thereupon, the witness was excused and left the stand.)

Mr. Hellenthal: At this time will counsel for the defendant stipulate that in the case of the Mt. McKinley Apartment House, which is owned by the Coffey House Corporation, that there are separate meters for each of the tenants and that there is one meter to measure the house power and that there is one other meter to measure the elevator motor power, which is in excess of the limitation of the rate schedule? The reason I asked that is the questions that counsel asked indicate that he believes that to be true and it would save time if he would so stipulate.

Mr. Rader: I would so stipulate. I shall further request in that stipulation, I don't think there will be any objection to it, that it is 14 stories high, that it contains approximately 200 apartment living units, that it occupies approximately one acre of ground, and that there is one point of [226] service by the City of Anchorage to that building.

Mr. Hellenthal: I will so stipulate except I would like to ask a question about the number of tenants in that building. 200 seems kind of high to me.

The Court: I suppose the precise number would not be material.

Mr. Hellenthal: 120 I am informed is closer.

Mr. Rader: That is fine.

Mr. Cottis: The one property is on 2 city lots and the other is on 5 acres, I believe.

Mr. Rader: If you want some more information on that, there is one house meter for power, one house meter for lights, being a different classification under our schedule, and Mt. McKinley offices,

I understand, occupies one of the apartments so there would be another house meter in their name. It is not a house meter, the apartment building which they occupy as offices.

Mr. Hellenthal: I think the reason was, as I stated, the power meter is because of the elevator motor. Now, the acre that you refer to consists of 2 subdivided City lots, does it not?

Mr. Rader: Frankly, I don't know. I imagine that it does. Well, now, is that the same situation——

Mr. Hellenthal: I am confining myself to Mt. McKinley.

Mr. Rader: I would like to inquire and ask if we can make another stipulation as to [227] 1200 "L"?

Mr. Hellenthal: As soon as we finish with McKinley I will go to 1200 "L." Do you so stipulate the McKinley consists of 2 City lots?

Mr. Rader: Yes.

The Court: Will somebody tell me why that is important?

Mr. Rader: I haven't the slightest idea.

The Court: It is a waste of time to dwell on these immaterial things.

Mr. Hellenthal: Your Honor, you recall the brief we furnished your Honor a week ago. In that brief is a case called Philadelphia Suburban Water Co. v. Pa. Public Water Co. Commission. That case dealt with the Colonial Housing Project which was an F.H.A. project and similar to these F.H.A. projects.

The Court: I want to know why it is material to show it was subdivided?

Mr. Hellenthal: The court in that case made some point of it and we are just trying to bring our clients squarely within the rule of that case and that is the only reason that I asked for it.

The Court: You can find a thousand cases and if you tried to bring yourself within the facts of each one of them we would be here a long time.

Mr. Hellenthal: That is the only reason we did it.

The Court: I am not going to pay any attention to the stipulation of that fact. I think it is wholly immaterial and just [228] takes up the time of the court.

Mr. Hellenthal: Now, Mr. Rader, can you stipulate that the 1200 "L" Street Apartment is owned by a corporation known as the 1200 "L" Street Corporation?

Mr. Rader: I don't know who owns it.

The Court: It wouldn't make any difference anyhow.

Mr. Hellenthal: That it has the identical services that you described for the McKinley apartments except that I don't know about the office?

Mr. Rader: I think so. I will say they are identical. If you can find anything contrary—

Mr. Hellenthal: I would like to have a stipulation—I do think this is material. Can you stipulate?

Mr. Rader: Well, Mr. Hellenthal, I am as ignorant about that other office as you are.

Mr. Hellenthal: Forget about the office.

Mr. Rader: I will stipulate to the rest of it.

Mr. Hellenthal: The services are as described for its twin, the Coffey House Corporation, also a 14-story apartment building?

Mr. Rader: Yes, and the further stipulation, if it is of importance to you, that that is not on 2 city lots.

Mr. Hellenthal: That is on 5 unsubdivided acres, if you think it is material.

The Court: I don't want counsel getting into discussions [229] I have ruled out.

Mr. Cottis: We will call Robert W. Retherford.

ROBERT W. RETHERFORD

called as a witness for and on behalf of the plaintiffs and, being first duly sworn, testifies as follows on

Direct Examination

By Mr. Cottis:

Q. Your name is Robert W. Retherford, R-e-t-h-e-r-f-o-r-d? A. Yes.

Q. Where do you live, Mr. Retherford?

A. In the outskirts of Anchorage.

Q. And what is your profession?

A. I am an electrical engineer.

Q. Do you have any college degrees?

A. Yes, Bachelor of Science in electrical engineering from the University of Idaho.

(Testimony of Robert W. Retherford.)

Q. Did you undergo specialized training in connection with electrical matters for the Navy during the last world war?

A. Yes, there was some specialized training while I was in the Navy.

Q. Are you a registered electrical engineer?

A. I am a registered engineer in the Territory of Alaska and in the state of Idaho.

Q. Are you a member of any professional [230] society?

A. I am a member of the American Institute of Electrical Engineers.

Q. Have you ever published any papers concerning electrical engineering?

A. A few.

Q. For what publications?

A. One of them was published in the *Electrical World* and another in some university magazines.

Q. How long have you lived in the Anchorage vicinity?

A. Well, it will be 5 years this fall.

Q. What was the nature of your business when you first came to Anchorage?

A. Well, shortly before I came to Anchorage I was in the consulting engineering business in the Northwest and came to Anchorage as an employee for Chugach Electric Association.

Q. Employed in what capacity?

A. As their system engineer, Chief Engineer, I guess you would call it.

Q. And how long were you the Chief Engineer for Chugach Electric Association?

(Testimony of Robert W. Retherford.)

A. Until the first of June, 1954.

Q. What have you been doing since that time?

A. I have been in private practice since then.

Q. Private practice as a consulting electrical engineer?

A. Yes. [231]

Q. Do you employ other engineers?

A. Yes. I have 4 men of various classifications.

Q. And then you have other office help and that sort of thing?

A. Yes.

Q. And you are the owner of that consulting engineering business?

A. That is correct.

Q. You have also done consulting engineering in the States, have you not?

A. Yes, that is correct.

Q. Where and when?

A. I was a partner in the firm of Howard Senior and Associates with headquarters in Vancouver, Washington, doing work in Oregon, Washington and Idaho.

Q. What kind of work?

A. Well, it was work for R.E.A. Co-operatives and Public Utility districts in those 3 states in connection with the construction of distribution and transmission lines, substations and system studies concerning feasibility.

Q. And what years were they?

A. Well, that was in the years directly following World War II up until 1950 when I came to Alaska.

Q. Did your work while you were in the Navy concern electricity?

(Testimony of Robert W. Retherford.)

A. Yes, it was indirectly involved. (Pause.) Well, moderately. It was both electronic and electric. It was in mine warfare involving various electronic and electric devices. [232]

Mr. Cottis: Your Honor, I consider Mr. Retherford qualified as an expert and if Mr. Rader doesn't——

The Court: I don't know yet what you want to qualify him as an expert on.

Mr. Cottis: On electrical engineering in connection with distribution—installation system; engineering concerning the installation.

The Court: I want to know whether you want to qualify him as an electrical engineer or as a rate expert?

Mr. Cottis: Not as a rate expert, your Honor.

The Court: Very well.

Mr. Cottis: If Mr. Rader wants to examine further as to his qualifications——

Mr. Rader: No, I think Mr. Retherford has been ably qualified.

Q. (By Mr. Cottis): Mr. Retherford, are you familiar with the distribution system installed on Government Hill for Panoramic View and Richardson Vista?

A. Yes, I am generally familiar with it.

Q. How did you get familiar with it?

A. Well, I visited the area. I have seen the installations.

Q. Have you examined any of the drawings in connection with it?

(Testimony of Robert W. Retherford.)

A. I have seen some of the drawings, yes.

Q. So you have a general familiarity with [233] it?

A. That is correct.

Q. Mr. Retherford, I will put before you Defendant's Exhibit H and ask you whether it portrays the distribution system in connection with those two establishments?

A. Well, it outlines in general detail the location of the lines and the transformer banks.

Q. Can you describe for us the electrical system, using, if it would be helpful, that Exhibit H?

A. Well, the projects, as I observed it, are served from the substation located here (indicating) which establishes the 33,000-volt transmission line and passes along Bluff Road. From that substation the distribution system——

Q. Excuse me, the substation is designated as such on that exhibit, is it not?

A. Yes, it is listed as Substation No. 5 on this drawing. That substation steps the voltage down from 33,000 to normal voltage of 4,160, I believe, and this distribution voltage is carried on other lines through the projects to individual transformer banks. These transformer banks in turn step the voltage down again to the voltage which is utilized in the buildings.

Q. Could you describe the distribution system between the transformer banks and the meter boards and the ultimate consumers in the apartment buildings?

(Testimony of Robert W. Retherford.)

A. From an inspection of the drawings of the buildings themselves [234] and looking at the lines, the last transformer bank has stepped the voltage down to the utilization voltage connecting 2 service drops which go to the building, either directly from the transformer bank or through a series of secondaries to other buildings nearby and these are arranged in groups on the inside of the building. The main entrance goes to the individual meters serving the tenants and the house on their separate circuits.

Q. From your observation of the installation, how would you characterize it further? How would you classify it?

A. Well, I would classify it as reasonably typical of an installation for a group of buildings of this kind.

Q. What is its classification as to whether it is single phase or 3-phase?

A. Yes, I guess I should add that. I believe that the buildings themselves are served with what is known as single phase, 122 4-volt 3-wire service.

Q. What sort of load is handled by the house circuits in connection with those buildings?

A. It is my understanding, from looking at the drawings, that the house circuits serve the lighting that is supplied by the owners of the building, it serves the small motors that are used in connection with the heating system and probably serves the laundries and other appliances that might be placed there by the owner. [235]

(Testimony of Robert W. Retherford.)

Q. From the point of view of an electrical supplier, is that a desirable type of load?

A. Yes, generally speaking that type of load is a reasonably consistent load. It is year 'round in nature. The fluctuation might be classed as a little bit better in character than the residential load, as an example, that is, each one of those may vary but generally speaking that type of load is a desirable load from the standpoint of utilities.

The Court: We will recess for 5 minutes.

(Whereupon, at 4:25 o'clock p.m., following a 5-minutes recess, court reconvenes, and the following proceedings were had.)

Q. (By Mr. Cottis): Mr. Retherford, you have examined Defendant's Exhibits C, D, E, F and G which are the various electrical tariffs that have been in effect, have you not?

A. Yes, sir, I have seen them from time to time.

Q. In your opinion, Mr. Retherford, do the published tariffs, as set forth there, appear to preclude the opportunity for such establishments as this to obtain the benefits of single point service?

A. No, I see nothing or have seen nothing in any of these published rates which would preclude a commercial establishment such as this from obtaining the benefit of a single point of delivery. [236]

Q. How could these two establishments obtain such benefits?

A. Well, a single point of delivery or the benefits

(Testimony of Robert W. Retherford.)

of single point of delivery can be obtained in several ways and in listening to the proceedings here so far I am of the impression that there is some confusion perhaps existing. I am an engineer, shall we say, and what I have heard leads me to think there may be a little confusion existing as to the difference between the delivery of power to a premises and the metering of that power. Now, those two things are different in nature. The metering of the power can be done in many ways. The delivery of power is generally the major item of expense and the best method of accomplishing that is often dictated or practically always dictated by the economics of getting the power to the user. The method of metering can be handled in many ways and it is a simple technicality, so to speak. It can be done in many ways and I am very much interested personally as an engineer that all of you who may be trying to understand this clearly see the difference between the delivery of power and the metering of that power. I will mention three arrangements that could be used to meter this power. One of them is what you call primary metering. The word has been used here. In primary metering it consists of the installation of a metering arrangement at some point where all power supplied the project passes through that one point and that usually occurs and takes its name "primary" from the [237] fact it is generally done on the higher voltage lines, the distribution line itself. The metering is accomplished at the higher

(Testimony of Robert W. Retherford.)

voltage level and takes its name "primary metering" from that fact. There is another way of metering all the power that flows to a particular project, group of buildings or whatever it might be, called "secondary metering." This metering is done on the low side of the transformer banks that are involved in the project and that would entail the interconnection of facilities on the secondary side passing all the current through one point to the secondary system and metering it at that point. The third method, and in this case is probably the one that is far more practical than any of those I have mentioned so far, is the simple method of totalizing which involves only the installation of distribution to totalize the readings of the meters that are installed as presently arranged in these buildings. That can be done. It can be done fairly reasonably, but there is some expense attached and there might be some question as to whether there is a good reason for installing a totalizing meter when you simply take the readings of it, add them up and produce the same results. In the case of this last method I will have to point out that the user, the final consumer gains one benefit that he should reimburse the utilities for and that is that he does not pay for some of the losses that the utility suffers in delivering the power to that point. In [238] addition he does not pay for a share of the investment which the utilities may have made in order to interconnect his buildings. Now, in the case of primary metering

(Testimony of Robert W. Retherford.)

the owner of the project, we will say in this case, may own all of the facilities beyond the meter, if he does then there is no question of that kind, however, where individual tenants in these apartment buildings are being metered there would be complications arising. When you come down to the billing of individual tenants using the owner's lines that aren't owned by the utilities and so forth, it can get complicated. The simplest way, I believe, is the way it is arranged there right now and that in considering this commercial establishment as one user of a commercial classification, which it is, and the facilities in the same identical classification as the apartment buildings you have pointed out, it is one user. It is a commercial user. It is the same class as those buildings. I see no reason why, especially if there has been a meeting of the minds prior to the beginning of the project, as has been testified to, that the client is one consumer, this consumer would not be given the benefits of single point metering.

The Court: I didn't know the parties were in dispute on that. I don't know why it couldn't be stipulated to.

Mr. Cottis: Frankly, your Honor, if the defendant will stipulate to the fact that there is nothing in the City tariffs [239] or regulations or ordinances which prohibits the benefits of that one point service, I should think we would be entitled to summary judgment.

(Testimony of Robert W. Retherford.)

The Court: That isn't what I have in mind that he would stipulate to, but that he stipulate that it could be done in this way.

Mr. Cottis: Without violation of City regulations and ordinances?

The Court: I don't think he would be required to go that far. In other words, this witness would not be able to go that far.

Mr. Cottis: He has testified that he sees nothing in the published——

The Court: That is not binding on me. I have got to determine the law, not the witness. So it seems to me that all other matters except his idea of the law could have been stipulated here, that is, at some saving of time. I think in the stipulations of the City the other day is the admission that it could have been handled this way by the City, but that the City didn't choose to do so and that it has that latitude, that it can adopt some other course, and as long as it is reasonable and not arbitrary and discriminatory that is all the City is required to meet.

Mr. Cottis: The City may have been willing to stipulate that it was the boss and could do what it pleased, your Honor, but I don't—— [240]

The Court: No, I mean all these facts to which the witness has testified concerning the delivery of current to these buildings and distribution. That is certainly something there can't be any controversy about.

(Testimony of Robert W. Retherford.)

Mr. Cottis: There will be a controversy about the conclusion, possibly, that he has testified to—that the reason there is a separate house meter on each building is because it is the most economical way to supply the power irrespective of the metering problem.

The Court: Well, if the proposal was made to stipulate to these facts and it developed that was one to which the parties agreed then the defendant could have been limited to that one point.

Mr. Rader: If it please the court, we have listened to Mr. Retherford's testimony and I don't agree with some of his conclusions altogether, but certainly his factual statement as to the method of doing this and also to the fact that the cheapest and most economical method of doing it is totalizing the metering, totalizing the bill, providing you would treat them as one customer, is the most economical method, we agree with him. He is a hundred per cent correct. We will go that far in a stipulation.

The Court: Well, but a stipulation is too late. I am making this observation now to counsel not to be putting somebody on the stand to testify to something to which there is no controversy or to which a stipulation may be arrived at. [241]

A. Maybe I was going a little bit overboard there because I probably have been somewhat confusing you by the layman's language on this subject and I was merely trying to clarify it from an engineer's point of view.

(Testimony of Robert W. Retherford.)

Q. (By Mr. Cottis): From an engineer's point of view, Mr. Retherford, what is the difference, if any, between the commercial house current used in connection with the 1200 "L" Street Apartments and the McKinley Apartments and the plaintiffs here?

A. Well, there is no basic difference. The only difference is physical isolation of one unit from another and that difference, if you want to bring it down into specific items, consists primarily of the wiring involved to tie them together. In the case of your 1200 "L" and McKinley buildings, the owner provided the wiring to tie all the floors of that building together, to inter—tie all of the house electrical circuits to one point. It is my impression he could have done the same thing in Panoramic View, but he was under the impression it may not have been necessary because it was cheaper to do it the way it is done now.

Q. And there is no basic electrical difference, then, from an engineering point of view?

A. No. The only difference is this physical one I explained which involves the physical—which interconnect the circuits of the owner. [242]

Q. Now, you mentioned something about there being a difference under some of these possible systems in electrical losses due to losses within the transformer and the length of the electrical lines. Can those line and transformer losses be measured with precision?

(Testimony of Robert W. Retherford.)

A. They can't very readily be measured with precision, however, there are calculations that can be made and there are many cases where consumers and utility have no difficulty arriving at a meeting of the minds on an allowance for losses in those cases.

The Court: Now, I am wondering how can the fact of losses in transmission possibly be relevant here?

Mr. Cottis: Mr. Rader in his opening statement, Your Honor, made some point of the fact that here the City had to put in a service drop to each of these buildings and they had all that expense, and, therefore, it was proper to treat each building as a separate establishment. Now, I am endeavoring to bring out from this witness that true there is some little expense in putting in that separate service drop which would not be involved if the consumer owned the service drop, and that the expense in the line loss and transformer loss which under the setup on Government Hill is borne by the supplier and possibly in all fairness should be borne by the consumer.

The Court: When you speak of supplier, you mean the City? [243]

Mr. Cottis: Yes.

The Court: Well, since it has already been testified to that it is not susceptible of measurement then what is the use of talking about it?

Mr. Cottis: I offer to prove by this witness, Your

(Testimony of Robert W. Retherford.)

Honor, that a practical measurement that is reasonably accurate of the amount of that loss, namely, something less than 5 per cent in connection with these buildings, is the standard.

The Court: Well, you say it is standard. Where?

Mr. Cottis: For this situation.

The Court: But evidently the supplier of current here, and perhaps elsewhere, because of difficulties of measurement doesn't resort to that and he prefers some other way of, you might say, recouping losses, so it seems to me we are getting nowhere in proving that there are losses in transmission and that those losses bear some different relation to other expense of this drop than has been assumed or stated here. I don't see where we are getting anywhere.

Mr. Cottis: I am offering to show Your Honor that in this particular installation those losses amount to less than 5 per cent of the metered house current.

The Court: I understand that, but after you have shown that then how do you apply it?

Mr. Cottis: It is in connection with the granting of the most favorable rate to the consumer. [244]

The Court: Well, that is what I want to know, how it would be pertinent in determining or granting this so-called most favorable rate. How would you apply that fact to it?

Mr. Cottis: Well, Your Honor, if that loss, say, were 100 per cent it might be that the City already has given us the most favorable rate. In other words, by metering us separately at each building and

(Testimony of Robert W. Retherford.)

charging us on a sliding scale for that building they may have given us the most favorable rate. I want to show that they have not because the loss would not be 100 per cent; it would be less than 5 per cent.

The Court: Well, proceed.

Q. (By Mr. Cottis): Mr. Retherford, what in your opinion would be the maximum line and transformer loss at these establishments?

A. Well, in this particular case with the arrangement involved there I feel that it would be less than 5 per cent of the metered amount of energy delivered to the house portion.

Q. Mr. Retherford, will you assume that at the inception of construction of these establishments the City had informed the owner that if they metered each building individually they would be charged for each building as an individual customer. In other words, just the contrary of the plaintiffs contention. With that assumption what could the owner of the establishment have done, if anything, to provide a physical point of single entrance for the City? [245]

A. Well, they could have inter-connected the buildings with their own installation providing a single point of delivery for the owner's own circuits in all these buildings. They could have inter-connected it.

Q. Do you have an opinion as to whether that would have been more or less expensive than the present system?

(Testimony of Robert W. Retherford.)

A. Well, I am sure it would have been more expensive than the present system.

Q. Could this inter-connection of house circuits be accomplished today?

A. Yes, it could still be done, but again it would be more expensive than if it had been done at the original—during the original construction period.

Q. Can you tell us what it would have cost back in 1949 or 1950 to provide a single point for delivery of service?

A. Well, to give you an estimate that is very good it would require quite a little study.

Q. In other words, it would not be possible for you to do that?

A. I could make an awfully rough one, but that is—I think perhaps to show you what might have went on in the minds of the architects, if they were faced with this problem, is that if the alternates were available as I have described, 1, 2, and 3, primary, secondary or the totalizing, they would find that the totalizing arrangement was definitely the most economical and would have been the one chosen. [246]

Q. When you say totalizing, are you referring to tele-metering?

A. No. Totalizing could be done by tele-meter, but that is a technical term that may imply some other things. Totalizing would be done merely by sending a signal from each meter in the individual buildings to a master meter which simply records

(Testimony of Robert W. Retherford.)

the total mathematically. It is a sort of adding machine of kilowatt hours and would save the trouble of adding them up arithmetically each month.

Q. How much cost would be involved in that method of applying a single meter?

A. Well, that cost would not be terrific. I would say probably less than \$2,000.00 for the type of project there.

Q. And the alternative under the present setup is to simply use an adding machine on the house meters?

A. Yes. That system of simply adding meter readings is done by utilities where it is impractical for one reason or another to install a single meter even though the consumer is treated as a single customer. There are cases and, as a matter of fact, I have some recollection that the old City Ordinance 55 has a provision to do that very thing. Do you have a copy of that?

Q. I hand you a photostatic copy of Exhibit I, which is entitled "Ordinance 55." Can you tell us the provision to which you refer?

A. Yes. If I be permitted to read I will just read this Section 24 [247] that has to do with this combining—"For the purpose of making charges all meters upon the consumer's premises shall be considered separately and the readings thereof shall not be combined, except that where the City shall, for operating convenience, install upon the consumer's premises, in place of one meter, two or more

(Testimony of Robert W. Retherford.)

meters, then the readings of such two or more meters shall be combined for the purpose of making charges."

Q. From your observation of the two establishments with which we are concerned here is this such a case that it is more practical—in other words, to have done it the way it was done?

A. Yes. I would say on the basis of your testimony that the consumer was to be treated as one commercial installation; that for the operating convenience of the City it would certainly have been practical to do it this way, just the way it is arranged on the Hill there now.

Q. Now, if the City had informed the plaintiffs otherwise—will you make this assumption—that the establishments would have saved \$10,000.00 per year in comparison with what they have been charged by the City for house electricity. With that assumption would it have been economically feasible assuming, as I say, the City said, "No, you are going to get billed separately for each building," would it have been economically feasible for them to go to one of these more [248] expensive of these 3 methods you outlined?

A. If your saving was \$10,000.00 I think there is one of those methods that could have been used that would have been more economical than paying that \$10,000.00.

Q. Which of the methods would that be?

A. Probably the primary metering system.

Q. Is it possible that the other methods would

(Testimony of Robert W. Retherford.)

have been economically feasible in view of the hypothetical saving of \$10,000.00 a year?

A. When I mentioned the use of the primary metering system I was assuming you had implied it would not be allowed to totalize. Then the other one I mentioned was secondary metering and I suspect that would be somewhat more expensive than the primary metering installation.

Q. With the \$10,000.00 per year saving in mind tell me whether that would have been economically feasible, the secondary metering?

A. Well, one analysis that has been made, which I have seen, indicates that quite a considerable saving is possible on primary, so possibly even a secondary system might have represented a saving, although not as much.

Q. Now, the analysis to which you refer concerning primary metering, is that the analysis given by Mr. McKinley in his letter?

A. I think perhaps that is the letter I saw. [249]

Q. I show you Exhibit No. 4 and ask you if this is the analysis to which you refer?

A. Yes. Yes, this is the one that I was thinking about.

Q. And part of that analysis, is it your testimony, indicates a very substantial saving through the use of primary metering?

A. Yes, it does. I have not had occasion to check all their figures but I see no reason to disagree with the procedure they used basically in making these calculations. That was their conclusion I believe.

Mr. Cottis: No further questions.

(Testimony of Robert W. Retherford.)

Cross-Examination

By Mr. Rader:

Q. Mr. Retherford, the primary metering method—who owns the transmission lines between the primary meter and the house connection where it is consumed?

A. Well, now are you talking about some particular case?

Q. Well, when you use primary metering?

A. You mean, typical primary metering installation?

Q. Yes.

A. Normally you probably find that the ownership of the facility beyond the meter was the consumer's.

Q. Which in this case would have been the housing project? [250]

A. That is right.

Q. Now, in the case we are talking about here, assuming that the City of Anchorage ran a line to the substation, as you pointed out on the map, is it a reasonable statement to say that the City has around \$60,000.00 worth of investments there?

A. You mean in those distribution facilities?

Q. In the distribution facilities.

A. I believe that figure was outlined in this letter. Yes, that sounds reasonable.

Q. But with a general primary metering setup those facilities would be owned by the consumer?

A. I would say perhaps a portion of those would

(Testimony of Robert W. Retherford.)

if the consumer was the consumer in total. Now, remember in this case there is a lot of tenants involved here too.

Q. Yes, I appreciate that. In other words, in this case the City would probably continue to own its own lines because it has to serve the tenants?

A. That is one way.

Q. Another way would be for the consumer to own the whole thing and another way would be if the City owns the lines for the consumer to rent from the City? A. Yes.

Q. Have a primary meter, pay a primary meter rate and then rent the lines? A. Yes. [251]

Q. Now, you are familiar enough with rate schedules so that you know that a lot of times a primary meter rate is different than a rate that is not primary metered? A. That is right.

Q. That sometimes there is a distinction?

A. Yes.

Q. Consequently, when utility companies have primary meters they very frequently change their rates and don't apply the rate that existed, therefore, making a special classification on primary meters?

A. That is correct because the consumer consumes more of the losses by so taking his service.

Q. So in the present case if there had been primary metering and they had granted primary metering to these people up here it is very probable that the immediate results would have been a rate change to allow for that. Isn't that correct?

(Testimony of Robert W. Retherford.)

A. I would say if they set it up originally on primary metering on the basis that the project would serve the entire load that the City would not serve the tenants—your primary rate would certainly be different.

Q. Well, but assume that the City insists on serving the tenants?

A. Well, of course, you are outlining a situation where you get into a great deal of bookkeeping—

Q. You get into—excuse me. Go ahead.

A. —which means that you would have a little difficulty in [252] classifying what might be considered as a primary rate, what might be considered as a residential rate. It is merely a device whereby you separate the tenants from the project. Primary metering in that case would appear to me to be a device whereby you separate the tenants from the project. You take the tenants meter readings and subtract it from the primary meter reading and the difference is losses and what is used by the project.

Q. Then there would be quite a lot of bookkeeping involved?

A. There would be some bookkeeping. There is no doubt about it.

Q. What would that bookkeeping involve?

A. Well, you would have to make an analysis of the system and the usage of the consumers to determine what portion of it might be chargeable to the house.

Q. Now, let's just take that point and we will

(Testimony of Robert W. Retherford.)

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Q. Now, let's just take that point and we will

(Testimony of Robert W. Retherford.)

go on to the next one in just a minute. When you make an analysis of the system what do you have to do then to do that?

A. Well, you generally take the inventory, the work orders that were used when you built the system, and you have a pretty good idea of what it cost you to build it. You can take some of the meter readings you have available and determine how the use of that system is shared between the project owner and the tenants, and on that basis arrive at a reasonable proportion of use for those facilities.

Q. Figuring it as now in the instant case, would you consider a [253] house meter just like an apartment meter when you consider the proportionate share of the burden on the system?

A. Well, the house meter in this case is a device to determine the share. It would not necessarily even be read after you once set this up.

Q. Then you have quite a problem in setting it up. Would you, in setting it up, compute a house meter as having the same rate as an apartment meter?

A. Well, it wouldn't be necessary to install the house meter in this case.

Q. I know. Well, let's say we want to put in primary metering now. Then would you give it the same rate?

A. How do you mean the same rate, John?

Q. Well, what I am trying to get at, Mr. Retherford, is, you have to go through this rate analysis

(Testimony of Robert W. Retherford.)

to compute how much you should charge to the house for the cost of installation and maintenance of that system. A. Yes.

Q. Now, how do you rate the house on kilowatt hours—excuse me. Go ahead.

A. No, I wouldn't rate it strictly on kilowatt hours usage basis because you have two different classes of consumers, your tenants is one class, the house is another class. If you give that classification due consideration then you can make a logical split of usage of facilities. [254]

Q. Well, how do you rate it? Do you consider—

A. You can rate it on the basis of demand. Demand would enter into the picture.

Q. Consumption?

A. Yes. I have gone through quite a few of these calculations.

Q. Yes, they are complicated, aren't they?

A. They are.

Q. Very complicated? A. Yes.

Q. Now, if the City adopted a method of primary metering, every time we went out and primary metered we would have to go through those same calculations for a particular project?

A. You would have to make the basic calculations once, that is right.

Q. So when you talked about whether or not you could effectuate a savings by primary metering, assuming that \$10,000.00 a year would be the difference, I think you just testified a few minutes ago

(Testimony of Robert W. Retherford.)

that probably you would set up a special primary metering rate if you had primary metering, wouldn't you?

A. Ordinarily there is a difference in rate established for primary metering.

Q. Now, there is nothing that says that rate wouldn't more than wipe out your profits from primary metering?

A. On the other hand the rate that is normally set up for primary metering is usually lower. You stand to gain, John. [255]

Q. I understand that it would usually be lower, but it doesn't necessarily have to be lower?

A. No, it doesn't have to be.

Q. So the City Council could have raised the rate over here?

A. Well, they might have become subject to being called discriminatory if they did.

Q. Well, they are only discriminating against people with primary meters, no one else. They are treating everybody with primary meters the same way, aren't they?

A. I think if you got into that it wouldn't be a case of metering. It would be a case of delivery of electricity to people. It isn't too closely tied in with the way you meter it. When you start talking about metering it is what you wind up with in dollars that you are getting.

Q. You are familiar with a lot of companies who would not permit primary metering under the circumstances we have up here, aren't you? Some of

(Testimony of Robert W. Retherford.)

them would and some of them wouldn't, isn't that a fact?

A. I expect you can find them on both sides. Most of the utilities I have had connections with would consider a proposition for primary metering. I mean, they would naturally protect themselves from losses of investments and so forth, but they would consider such a proposition.

Q. There would be some that would have a rule, probably, to the effect that they didn't have any primary metering? [256]

A. I have known of no such case in my experience.

Q. That don't insist they don't have primary metering? A. Yes.

Q. Would you say the City of Anchorage is unique, in all the system with which you are familiar with, in that we don't have primary metering?

A. No, I wouldn't say that. I think you have some installations, as a matter of fact, that would be classed as primary metering—whether or not they are labeled that way. In engineering sense they would be classed as primary metering.

Q. We have some primary metering?

A. Yes, I would say you do.

Q. In which instances would those be?

A. I am thinking of International Airport in this particular case.

(Testimony of Robert W. Retherford.)

Q. International Airport is where the City supplies through one point of delivery to C.A.A. which operates the International Airport, is that right?

A. That is right.

Q. A Governmental agency? A. Yes.

Q. Now, speaking other than that, do we have any other primary metering that you are familiar with?

A. Well, let me see. You have primary metering, of course, between the City and its neighboring utilities. For example, [257] the City and Chugach Electric Association, and you have primary metering between them, and between you and the Army and I think you have had it between the City and The Alaska Railroad.

Q. That could be. The Alaska Railroad is an agency of the Federal Government?

A. Yes, I believe they are under the Department of the Interior.

Q. Do you know of any other primary metering?

A. I am not quite that familiar with the City system. That is all I can recall right now.

Q. On primary metering you can work out a situation, as you said in one instance would be where the consumer owned the distribution system beyond the meter, is that correct?

A. That would be one system, yes.

Q. Another system would be where, if we applied it to Richardson Vista and Panoramic View, the consumer owned the facilities and leased them to the City for the City to supply the apartment house

(Testimony of Robert W. Retherford.)

owner? A. Well, that would be a possibility.

Q. That is a possibility? A. Yes.

Q. The third possibility would be for the City to own the system and lease it to Panoramic View?

A. That is a possibility.

Q. Then on each of those possibilities the maintenance obligation, the public liability for faulty work, it could be on [258] the consumer?

A. If that was the arrangement.

Q. The City would assume the public liability, or the public liability system if they owned it?

A. That is correct.

Q. It has an indefinite number of variations, does it not? A. That is correct.

Q. Mr. Retherford, assuming for purposes of discussion here that that system is worth \$60,000.00 as an electrical distribution system. Most rate structures are set up so that the facilities generally will pay for and the structures revenues will pay for the system, whatever it is?

A. That is correct.

Q. And generally speaking in rate structure you don't pick six or eight blocks and consider that as an individual unit, do you?

A. Well, I wouldn't say it that way. Utilities design rate schedules. It has come about over many, many years of experience and rate schedules today have a pattern of classification that is pretty well apparent throughout the country where electricity is used. There are exceptions, of course, and these patterns of classification simply set up, not a condition

(Testimony of Robert W. Retherford.)

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Q. On primary metering you can work out a situation, as you said in one instance would be where the consumer owned the distribution system beyond the meter, is that correct?

A. That would be one system, yes.

Q. Another system would be where, if we applied it to Richardson Vista and Panoramic View, the consumer owned the facilities and leased them to the City for the City to supply the apartment house

(Testimony of Robert W. Retherford.)

owner? A. Well, that would be a possibility.

Q. That is a possibility? A. Yes.

Q. The third possibility would be for the City to own the system and lease it to Panoramic View?

A. That is a possibility.

Q. Then on each of those possibilities the maintenance obligation, the public liability for faulty work, it could be on [258] the consumer?

A. If that was the arrangement.

Q. The City would assume the public liability, or the public liability system if they owned it?

A. That is correct.

Q. It has an indefinite number of variations, does it not? A. That is correct.

Q. Mr. Retherford, assuming for purposes of discussion here that that system is worth \$60,000.00 as an electrical distribution system. Most rate structures are set up so that the facilities generally will pay for and the structures revenues will pay for the system, whatever it is?

A. That is correct.

Q. And generally speaking in rate structure you don't pick six or eight blocks and consider that as an individual unit, do you?

A. Well, I wouldn't say it that way. Utilities design rate schedules. It has come about over many, many years of experience and rate schedules today have a pattern of classification that is pretty well apparent throughout the country where electricity is used. There are exceptions, of course, and these patterns of classification simply set up, not a condition

(Testimony of Robert W. Retherford.)

for a particular project, but they set a pattern which can be applied to a particular load. They define a particular type of a load. If the consumer wishes to bring [259] his load classification with the realm of the particular rate schedule the utilities generally will give him that rate schedule.

The Court: I think we will adjourn at this time.

Mr. Rader: Does Your Honor anticipate going ahead with this case in the morning?

The Court: No.

Mr. Hellenthal: Your Honor, you will recall there were discussions on two occasions last week of going through until noon on Saturday and I believe Your Honor said we would go through until noon on Saturday. I believe the first one was last Friday and then again at the last——

The Court: I might have mentioned it in connection with my doubts about the estimates counsel made as to how long this case would take, but I have decided to quit driving myself.

Mr. Hellenthal: Could I impose on you further. Two of our witnesses, Mr. Sarno, is leaving tonight for New York City and he could be here tomorrow if there were need for him to stay. Our second witness, Mrs. Hall, desires to return tomorrow to Seattle and we should like to have permission to allow these witnesses to go back to their places of residence.

The Court: If counsel for the defense wants them he should state so.

Mr. Rader: I will excuse them.

Testimony of Robert W. Retherford.)

Mr. Hellenthal: Thank you very much, Your Honor. [260]

The Court: Adjourn until Monday morning at 10:00 o'clock.

(Whereupon, at 5:41 o'clock p.m., Court was adjourned to Monday morning, March 28, 1955, at the hour of 10:00 o'clock a.m.) [261]

Mr. Rader: If it please the Court, I have a few cases that I have briefed—I can hardly call it a brief, but it is a memorandum, at least, of authorities and I have served copies on other counsel. I believe they all have them.

The Court: Did we conclude with the witness at the time of adjournment?

Mr. Rader: I don't believe so, Your Honor.

ROBERT W. RETHERFORD

resumes the stand and testifies as follows on

Cross-Examination

(Continuing)

By Mr. Rader:

Q. Mr. Retherford, you are the same Mr. Retherford who testified previously? A. Yes, sir.

Q. Mr. Retherford, the other day when we were discussing primary metering and the different methods of accomplishing the same, would it be a fair statement to say that primary metering and the rates for rental of properties and maintenance costs and that type of thing are largely a matter of negotiations between the consumer and the utility?

(Testimony of Robert W. Retherford.)

A. You mean the application of primary metering in determining a different rate or something than what it would be otherwise? [263]

Q. No. What I am referring to is assuming that the utility company owns the distribution facilities, as in the present case, and assumes further that the consumer wants to have primary metering and deduct the consumption of the individual tenants from that primary metering, then you would have to negotiate as to a reasonable rental for the use of the City's distribution system? A. Yes.

Q. That would be a matter of negotiation?

A. Yes, I think so.

Q. You would have to figure out a rate for amortization of your facilities?

A. It would be a matter of arriving at a meeting of the minds on how they wanted to approach that, yes.

Q. Mr. Retherford, I am handing you Plaintiff's Exhibit No. 4, I believe you are generally familiar with that letter? A. Yes, I am.

Q. Directing your attention to that paragraph which says, "A complete inventory and appraisal of the existing facilities used in serving these buildings was made, and estimates of the cost of rerouting the circuits so all buildings could be metered at one point were made." Directing your attention to that paragraph, what would be a reasonable fee on a contract basis for making an inventory of those facilities, let's say, of Panoramic View and of preparing the engineering [264] necessary for rerouting of lines? A. Well—

(Testimony of Robert W. Retherford.)

Q. Let me put it this way: Would you say \$1,000.00 would be an unreasonable fee for those services?

A. Well, not necessarily. Let me state this, that in the construction of such facilities there have surely been records kept and work orders and so forth involved in that construction and it would appear to me, unless there was some disagreement between the parties, that they would be willing to take the records of the construction as it was built without going into a special engineering study.

Q. Well, assuming that those records were not adequate and you had to make an appraisal of the existing facilities and an inventory of the existing facilities and also do the engineering for rerouting for, say, Panoramic View, would \$1,000.00 be an unreasonable fee for doing that?

A. Well, let's see. Give me a minute here to do that.

Q. Certainly. Take all the time you wish.

Mr. Reischling: If the Court please, I object to the form of this cross-examination as not material or relevant. It assumes matters that are not in evidence. There has been no testimony that the records covering the installation of these particular facilities the City has are inadequate and he is asking this witness to assume something on the basis of another [265] assumption.

The Court: I think it is permissible on cross-examination of an expert after he has testified. Objection overruled.

(Testimony of Robert W. Retherford.)

A. Well, let's see. On the basis of your question then, Mr. Rader, assuming the value of these lines is somewhere near as indicated in this letter and that it was found necessary to make an engineering appraisal apart from the records that were already in existence this \$1,000.000 you mentioned is probably somewhere in the vicinity of what it would require. There might be special conditions and so forth, but then that is somewhere near the magnitude of what it would be, I would say.

Q. Does that include what you call a nut and bolt inventory?

A. Well, it might. There again you have considerable variables. If there are standard patterns of construction in existence, why, the use of standards makes your inventory much easier to do. You can inventory it on the unit assembly basis where your nut and bolt inventory is automatic.

Q. Now, assuming that you use those standards, there would again be a lot of room for argument between a consumer and the utility company if you used an average or standard instead of an actual nut and bolt inventory, detailed inventory?

A. Well, yes. There is the margin of accuracies in any of these types of negotiations. It is something that anybody [266] could argue down to as fine a point as you felt it was worthwhile arguing about. You can get into it where you can argue about the length of the bolts, if you wish, and go and measure every bolt, but that isn't a general procedure and it is usually possible to arrive at an agreement on the

(Testimony of Robert W. Retherford.)

value of the system without spending an unusual amount of money for engineering purposes.

Q. If you had to go into it too far it would be impossible—it would become unreasonable and make it an impossibility?

A. Certainly.

Q. Which is not generally required?

A. No.

Q. Mr. Retherford, directing your attention again to that letter, do you see anything in that letter which allows for administrative costs?

A. Well, let me review it.

Mr. Reischling: If the Court please, I object on the basis the letter speaks for itself.

The Court: Well, that is true of all exhibits except that counsel has a right to call attention to some particular part of the exhibit in order to lay a foundation for the succeeding question. I assume this is what he intends to do, otherwise it would be useless and senseless to ask the witness to merely repeat something that is already in the document.

A. On administrative costs, you mean what the administrative [267] costs would be in connection with electrical service or in connection with the construction of this system?

Q. Construction of the system—well, the administrative costs and construction of the system would probably be included in a valuation of the system of facilities, would it not?

A. I would think so.

Q. In the \$60,000.00 figure?

(Testimony of Robert W. Retherford.)

A. That is right.

Q. How about in the operation of the system?

A. Well——

Q. Maintenance, upkeep?

A. I see nothing in these figures here showing a breakdown of the value of the portion of the system that might be used by the project that would include administrative costs, however, it occurs to me in the furnishing of electrical service that is normally covered in the rate itself, the administrative costs is one of the things that is ordinarily covered in the rate unless you are referring to some special administrative cost that is not normal in the furnishing of electrical service.

Q. Well, now assuming that we rented a part of the existing City facilities to the consumer. Wouldn't there be an additional administrative cost involved in that?

A. Well, you might say there would be. I would say in this [268] case it would be very slight because the majority of the work would come in the original negotiations. When there was some agreement arrived at between the project and the City, we will say, which would determine exactly what portion the City was going to lease or rent—I mean, the project was going to lease or rent and from that time on it would be merely a basis of calculation of simple percentage which might only be done once.

Q. That letter, I think you testified previously, does not include line losses and transformer losses?

A. I don't think that is covered here. That is correct.

(Testimony of Robert W. Retherford.)

Q. Mr. Retherford, it would be a fact, would it not, that the most economical way for a utility company to supply a consumer would be through a single connection and single point of delivery?

A. You mean from the standpoint of utility?

Q. From the standpoint of the utility, pure and simple.

A. If you are going to serve one consumer you try to make it as simple as possible and one connection is certainly about as simple as you can make it.

Q. Well, you would go further, wouldn't you, and say that single point delivery from the utility's viewpoint is the simplest and easiest and the cleanest way to handle something?

A. Well—— [269]

Q. Delivery to a customer?

A. Yes, I guess you could make that statement. There are cases where it would conceivably be to the utility's advantage to have more than one point. It depends on the—well, for example, I can see where you might have a utility system pretty much in existence, and a load would come along, the utility system is such that they might be required to rebuild or add a little bit to their own system in order to be able to serve that consumer at one point, whereas, if they took two they might be able to use their existing facilities. There are cases of that kind that could happen, however, as you state, if you start from scratch the simple way is probably one point.

(Testimony of Robert W. Retherford.)

Q. Now, assuming, Mr. Retherford, that there were 17 points of delivery on a tract covering 23 acres and assuming that there were no other customers on that tract, the simplest and easiest thing for the utility company to do, if they could, would be give one point delivery some place on the tract. Is that correct? A. Yes, I think so. Yes.

Q. Mr. Retherford, I am handing you Exhibits A & B. Have you ever seen those before?

A. I am afraid I haven't seen them this close before. I saw them presented in Court, but I have not looked them over very carefully. [270]

Q. Let me take one of them. In the lefthand column is a building number, then it has kilowatt hours—following from left to right—then the amount billed for that particular building. Looking at those generally so that you have an idea of the power load for each individual building as a general average. A. Yes.

Q. Assuming that the 17 points of delivery, that I previously mentioned, on a tract of 23 acres were disbursed as indicated on Exhibit H over the tract and that there were no other consumers on that tract, what would be the cost of installing a distribution system adequate to handle that tract and all the consumption?

A. You mean the consumers in these buildings too?

Q. No. Assume only that the 17 consumers are the only consumers and consume the amount as indicated on Exhibits A and B generally. In other

(Testimony of Robert W. Retherford.)

words, taking the tenants off that land—we are taking all the renters off the land, off the project and the only thing we are going to do is build a distribution system to serve the house meters.

Mr. Reischling: If the Court please, I object to this. This is just highly speculative. This entire system was not built for the hallways of Panoramic View. It was built and designed and constructed up there to serve 682 families. Now, it is the height of being ridiculous to say how much would it [271] cost to bring power to 14 buildings of Panoramic View for the purpose of lighting hallways and furnishing power for a laundry for which there would be no tenants and furnishing the power for pumps to pump steam through the buildings for no tenants. I mean, I think counsel's question here, when he says how much would it cost to put in a system to do what Panoramic View does not do, is absurd. This entire plant or plants was developed and constructed to serve the people that use the power. The incidental use that the buildings use is nothing but incidental to the general use that is necessary for the tenants that live on the Hill. After all, we are not trying a rate case or establishing a rate or anything of that kind. We are merely talking about billing here and the City never did contemplate building a plant out there, or plants out there, nor did we, nor does anyone, to light hallways for non-existent tenants.

The Court: There is no reason why a question cannot be broken down, why you couldn't eliminate

(Testimony of Robert W. Retherford.)

the ultimate consumer, if the question is not otherwise objectionable. The objection will have to be overruled on that ground.

Q. (By Mr. Rader): Could you give us a rough estimate? I understand it will be rough.

A. It will be rough, all right. These buildings are all single phase. The loads individually aren't great. You could eliminate, of course, a considerable amount of heavy [272] construction that is there now and if you assume that the City would supply the power to some central point where there would be one delivery, the project would distribute it to their buildings from that point.

Q. Now, Mr. Retherford, assuming that no facilities existed and you had to build a distribution line and a distribution system to serve those 17 points distributed over 23 acres and the system were a capacity adequate to serve power as indicated by Exhibits A and B to those points individually——

A. Let me make sure I am clear on this. In the first place if you had a group of such buildings, let's say, they are individual homes, for example, now instead of these I am assuming that the utility involved would build their lines to some load center where they would make this point of connection.

Q. That is correct.

A. And that the remainder of the system in this case would be furnished by the project.

Q. That is right, and that there is no existing system there prior to that?

A. If you assume the City comes to that load

(Testimony of Robert W. Retherford.)

center I would say that those 19 buildings could probably be connected for something on the order of \$200.00 or \$300.00 apiece.

Q. Does that include putting in poles?

A. That is right, yes. I can show you installations in the [273] Anchorage area that have been put up for that price where this type of service might be involved.

Q. Is it your testimony, Mr. Retherford, then that you could build a distribution system that extended over 23 acres to 17 different points of delivery that would include poles, wire, transformers and everything for a total of \$3,500.00?

A. On that order, yes, sir. That is beginning from your load center and supplying the rest of the system. Would you like a little more detail on that?

Q. Yes. Would you go ahead?

A. This particular one I hold here is Richardson Vista. I think if you look at the map you can count the poles. I am not sure there is that much detail in there. There aren't very many poles involved and the number of transformers necessary to serve these buildings alone would be quite small, so I think if you checked the actual investment necessary for that alone it is quite small in comparison to what you have there now. I can produce some figures on similar installations if you would be interested.

Q. What do you mean by a load center? Perhaps that is where we are getting—

(Testimony of Robert W. Retherford.)

A. Well, in the case of Richardson Vista, just looking at it from the practical standpoint there, the arrangement of those buildings, perhaps your load center would be at one [274] end of the project. In that case, which is—well, you know the way it goes there—now there is one line that runs through there, pretty much through the center and between two rows of buildings through the project and what I am visualizing is simply that one line, the service drops to the buildings with perhaps your connection point at one extremity of the project.

Q. Would that be approximately the same cost for Panoramic View?

A. Well, Panoramic has a couple of buildings sitting off on one side, as I recall. The rest of it is very similar. It might be a little bit more in that case, but still on that order, say, \$5,000.00 or something in that vicinity. I am assuming that the primary metering also in this case would be supplied by the City. It is customary for the Utility to supply the metering.

Q. And supply the connection? A. Yes.

Q. Now, could you give us any estimate as to what it would cost for the consumer to maintain those facilities in this case? Take the Panoramic View Corporation.

A. Well, that could be quite a variable proposition. In cases of that kind the probability is if the project makes such an arrangement they would make a proposition to somebody in the utility busi-

(Testimony of Robert W. Retherford.)

ness to take care of that little chunk of line for them at some figure. [275]

Q. They would negotiate probably a service contract with someone? A. Probably.

Q. If they had to do it themselves they would have to outfit themselves with all the equipment necessary to maintain public utility lines which would be prohibitive?

A. Ordinarily unless they had quite a bit of that type of work they were doing they wouldn't attempt it.

Mr. Rader: I believe that is all.

Redirect Examination

By Mr. Reischling:

Q. Mr. Retherford, isn't it a fact that when a basic rate for the cost of power is made by the Utility, it is taken into consideration in determining what that rate is the capital investment for all the facilities as one item? Isn't that correct?

Mr. Rader: If it please the court, I——

Q. Together with line loss and transformer loss and all the factors that go into making up the cost of the power to the Utility?

A. Yes, that is right.

Q. Plus a reasonable profit on top of that, is that not so? [276]

A. Yes, that is, the utilities that are supplied by the Utility. I mean, the installation that is supplied by the Utility.

(Testimony of Robert W. Retherford.)

Q. And when a rate is published by the Utility at which they agree to furnish power or current to the consumer that rate comprehends all of the costs to the Utility of the installation, of distributing the current to the ultimate consumer, plus a profit. Is that not so? A. Yes.

Mr. Rader: If the court please, I wish to object to the question first as being leading to an extraordinary degree and, secondly, that Mr. Retherford, I believe, in his qualifications was not qualified as a rate expert.

The Court: Well, it just seems to me that these matters are common knowledge. I don't even know why it is necessary to ask that question. Everybody knows in the figuring of the rates of utilities such factors as the one mentioned have to be taken into consideration, otherwise, you would never know whether you were going to make a profit or not by trial and error.

Q. (By Mr. Reischling): Mr. Retherford, when you talk about a single point service, that is actually what exists in each one of the 14 buildings of Panoramic View and the 19 in Richardson Vista, is that not so, presently today?

A. Yes, I think there is one service entrance to those buildings. [277]

Q. In each one? A. Yes.

The Court: Did you say to each of the buildings or to each of these two groups?

A. To each of the buildings. As it exists now

(Testimony of Robert W. Retherford.)

the utilities are owned by the City and the service drops go to each building.

Q. Now, the drop that goes to the building itself—that is, for the use of Panoramic View in its hallways that I am talking about now, the power that we are discussing in this case—if that one meter was eliminated would there be any lesser installation in each one of those buildings than there is right now other than that particular meter?

A. You mean would there be any lesser requirements to the utility supplying the system?

Q. That is right, other than that one meter?

A. Well, I would say that the utility system as supplied by the City presently would be very little different than it is now if that house meter were eliminated—that house service were eliminated.

Q. In other words, there would still have to be 22 independent, individual services for each one of the 22 tenants in the 22-unit building and the same service for the tenants in the 16-unit buildings and the 12-unit buildings?

A. It would be the same as it is now minus the house meter, yes. [278]

The Court: Well, what would take the place of the eliminated meter?

A. Well, I assume he may be talking about a case where the tenants supply their own house services.

Q. If there were none of these, that is, if the tenants prorated the cost of the hall lights and what not and it was all on their own meters?

(Testimony of Robert W. Retherford.)

A. There are cases where that is done. I don't think it is particularly general, but there are cases where there is no house meter and any apartment service is apportioned to the tenants.

Q. Now, actually then all that one particular meter does is to total the amount of power that is consumed by the house generally, apart from that used by each individual tenant?

A. It measures the energy furnished the house in that particular building.

Q. Now, Mr. Retherford, it is a fact, is it not, that the only problem at issue here today is the measurement of current that is used by the individual buildings for each corporation? Is that not so?

Mr. Rader: If it please the court, I can't see how that would be a proper question, to say the only problem is the measurement of current. I don't see that his answer would be of any probative value to the court.

The Court: I thought the problem here was not one of [279] measurement, but one of the rate.

Mr. Reischling: It is not one of the rate, your Honor.

The Court: Isn't that what the complaint is, that they are not given the benefit of the proper rate?

Mr. Reischling: In order to determine, your Honor, what is the proper rate and according to the published tariffs of the Company we must first measure the quantity of power used for the purpose of applying the rate. Now, by its own tariffs the

(Testimony of Robert W. Retherford.)

Company says that if you use 10 kilowatts it will cost you 7c.

The Court: But we have the consumption here, as I understand it, over quite a period of time, so there is no question about that, so it still resolves itself, it seems to me, essentially on a determination of the proper rate.

Mr. Reischling: Can that be done, may I ask your Honor, without determining the quantity of power that is used?

The Court: I just called attention to the fact that these exhibits show the power consumed and I thought the parties agreed on that.

Q. (By Mr. Reischling): Now, you testified on cross-examination Friday, Mr. Retherford, with reference to Exhibit L. Are you familiar with the installation at the International Airport?

A. Generally.

Q. Now, there was an inference in counsel's question, or I believe a statement, when he was interrogating you that [280] that power was furnished to the Civil Aeronautics Authority; that is a government agency. Do you know the names of some of the users out there at International Airport to whom power is furnished through that delivery system that was installed by the City of Anchorage?

A. Yes, I think the—well, what you might call the ultimate consumers in many cases out there are private airlines, The Alaska Airlines, Pacific Northern, various offices in the building. Many of these

(Testimony of Robert W. Retherford.)

firms have their own buildings on the airport that are served through that connection.

Q. There are restaurant facilities out there, too, are there not, that is privately operated that obtain power from the same hookup?

A. Yes, I believe so.

Q. And that power is sold by the International Airport or the C.A.A. to those users?

A. It is my impression, yes. The C.A.A. resells, if you want to call it that, to these ultimate consumers.

Q. In other words, this particular government agency has been put into the utility business by the City of Anchorage and sold power with the permission to resell to other private users?

A. They are reselling to private users.

Q. Do you know if there are other similar installations of that character in this [281] community?

A. No, I can't be sure. I thought perhaps there was a similar condition at Merrill Field, but I am not certain.

Mr. Reischling: That is all.

Recross-Examination

By Mr. Rader:

Q. Mr. Retherford, International Airport is outside the City limits. I ask your Honor to take judicial notice of that.

The Court: The court can take judicial notice of it.

(Testimony of Robert W. Retherford.)

Mr. Rader: I assume counsel will stipulate it is on a Federal Reservation.

Mr. Reischling: If you say so, counsel. I don't know but if you say so I won't dispute what you say. I don't know and that is why I say if you say so.

Q. (By Mr. Rader): Mr. Retherford, that supplying International Airport was competitive bid, wasn't it? The City of Anchorage was bidding with another power utility in this area?

A. I think in the original case, when they first called for it, it was based on competition.

Q. Mr. Retherford, in that situation where the City supplies power we have what we call single point delivery, don't we?

A. That is correct. [282]

Q. And all the distribution lines beyond the single point of delivery are owned by the Federal Government or the C.A.A.?

A. Yes, I believe they are.

Q. And are maintained by that authority?

A. I think so.

Q. So they don't rent any of the City's facilities as such? A. Not that I know of.

Mr. Rader: That is all.

Re-redirect Examination

By Mr. Reischling:

Q. Mr. Retherford, how far out is the International Airport from the City? Do you know?

A. It must be about six miles, I guess.

(Testimony of Robert W. Retherford.)

Q. Do you know what the cost was of bringing the power from the City of Anchorage to the distribution point at International Airport, that is, to the point at which it was primary metered?

Mr. Rader: If it please the court, that is going considerably beyond the scope of the recross. Now, this whole matter actually was on redirect and it is beyond the scope of the cross. We had cross, redirect, recross and now we are going beyond the scope of the recross. I object to it for that purpose. [283]

The Court: Well, but if it is material or relevant it seems to me that it is within the scope of the redirect. Why wouldn't it be within the scope of the redirect? There was testimony here that it is beyond the City Limits and that the City furnishes service upon being awarded the bid on competition. Now I wonder whether an example of that kind can have any relevancy in the determination of the question before the court?

Mr. Rader: I don't think it does have any relevancy but we can keep on going on it.

The Court: In other words, unless it is beyond the City Limits then obviously the regulatory power, the City council's fixed rates does not touch it and I don't see how, other than for illustrative purposes, it becomes material to inquire into these matters.

Mr. Rader: I quite agree with your Honor.

Mr. Reischling: I don't understand your Honor's conclusion that the regulatory power of the City

(Testimony of Robert W. Retherford.)

does not touch it. This utility is owned by all the people of this City. The City gave power to International Airport. It could be enjoined from so doing because the cost of bringing power to the International Airport, unless it is producing that power, is a direct charge to each and every consumer within the City. Therefore, it is very material to show what it cost the City for bringing that particular power out to International Airport and the rate at which the City elected to sell it to them on this competitive [284] basis without any requirement, as the exhibit shows, as to the quantity of power they could use.

The Court: Of course, that is extreme and far fetched illustration to imagine the City would furnish power to somebody at below cost. If my recollection is correct it is that regulatory power of the City, as far as regulating rates to somebody outside the City, and certainly it just seems to me it would be governed by the same consideration that would apply in fixing a rate for consumers within the City.

Mr. Reischling: If your Honor please, in the published rates which is in the telephone book, the City does publish a rate for furnishing rural or persons outside the City, which is far greater than the rate for furnishing the power to urban inhabitants.

The Court: I say, it would have to be that.

Mr. Reischling: Well, but this particular rate, as the contract shows, at which the power was sold

(Testimony of Robert W. Retherford.)

to the International Airport is 2.8 cents per kilowatt on 282——

The Court: So what? I don't know these other facts you apparently have in your mind so I don't see the significance of that.

Mr. Reischling: Counsel went into the cost of this particular distribution system to Government Hill. The cost of bringing this line out there was in excess of \$200,000.00 which we offer to prove by this witness, to the International Airport alone without any requirement that the International Airport used any [285] particular quantity of power.

The Court: I am unable to follow your argument. You will have to elucidate if you want me to take cognizance of it.

Mr. Reischling: If the court please, we are asking here we be accorded the rate to which we are entitled on a declining scale because of the quantity of power.

The Court: I understand that, but what isn't clear to me is that you are now attempting to draw some comparison with something beyond the City limits.

Mr. Reischling: Very well. It is a discriminatory point. The City, in this one particular instance at least, has discriminated in selling power for resale to an instrumentality five miles away or six miles from the City at a rate less than they charge the people in the City and at a rate that is not published in the Published Rate Schedule and under the laws of Alaska they are required to publish

(Testimony of Robert W. Retherford.)

this rate schedule at which to fix the rate schedule and publish the rate schedule before that rate goes into effect.

The Court: I am inclined to think before the court can give any consideration to a case of that kind, from which the inference of discrimination could be drawn, it should be shown as a sort of foundation that there are no instances within the City itself that can be used for the purpose of comparison or for the purpose of showing discrimination. I don't know why we should go outside the City to show where the method of supplying [286] the conditions under which current is supplied are so different that it is difficult to make comparisons and draw an inference of discrimination. So it seems to me before the court can consider examples of that kind at which current furnished to a consumer outside the City limits is furnished at a rate which would warrant an inference of discrimination it should be shown that there are no cases that would warrant the drawing of such an inference of consumers within the City itself. As I say, it just simply would add too greatly to the difficulties of the court. Now, if there are no instances of that kind that can be pointed to within the City itself, then, of course, we may go outside of the City.

Mr. Reischling: We gave counsel the notice to produce other contracts. I believe he stated that there were some, but he didn't know which ones there are. Of course, we have no knowledge of the

(Testimony of Robert W. Retherford.)

particular contracts under which the City may have entered.

Mr. Rader: I think it should appear in the record that counsel went to the City offices and went to the City files and that they were exhibited the contracts.

Mr. Reischling: I wasn't there. I didn't know that.

Mr. Rader: They had the opportunity to examine all of them and bring any of them back they so desired or specify them in the subpoena and we will produce them.

Mr. Cottis: Your Honor, Mr. Hellenthal isn't here [287] today. Judge Hellenthal had a stroke last night so John left for Juneau unexpectedly this morning, but he and I did go over to the City Clerk's office and were given access to a file drawer that was labeled "Government Contracts." It was the day that we reconvened at 1:30 and it was during the lunch hour in the City Hall and we had possibly a half hour or 20 minutes or so there. I don't know what portion of the City records we saw. Mr. Hellenthal made the arrangements and, as I say, he is not here today, but we did look part of a file drawer called "Government Contracts."

The Court: It seems in this connection that there is another question that occurs to me and that is, suppose that the plaintiffs could show that the City acted discriminatorily in the rate at which it furnished power to the C.A.A. It seems to me that while that would be a legitimate complaint on the

(Testimony of Robert W. Retherford.)

part of all consumers within the City how could the plaintiffs in this case show that they were in a different position from that occupied by any other consumer in the City?

Mr. Reischling: The law is that if the corporation—that any consumer has the right to sue—any consumer who is discriminated again in this city has the right to raise that point in court.

The Court: I am not raising that point, but I say, how are you going to argue that a favorable rate—you might say, a preferential rate with the C.A.A. at the airport is proof of the fact that the rate at which current was supplied is discriminatory? [288]

The Court: The reason for that, as I see it, is that the same argument could be made on behalf of every consumer within the City. It seems to me that when we draw comparisons for the purpose of supporting the charge of discrimination that the comparison would have to be made with consumers in the same situation as the plaintiffs, that is, consumers within the City.

Mr. Rader: If it please the court, would your Honor like to hear some authorities as to the different classification of the International Airport; how it is irrelevant to this case, immaterial?

The Court: I am already arguing that now.

Mr. Rader: I have authorities.

The Court: I don't see the relevancy of it and am still of that opinion after hearing what has been said here, so it is not necessary to make an

(Testimony of Robert W. Retherford.)

argument about it yet. I have already indicated that there would have to be a showing made first that there was no other consumer within the City limits of which a comparison could be made and then, of course, the problem we would be up against, if we went to the International Airport, is to show that the conditions were such that an inference of discrimination or preferential treatment could be drawn and in view of the conditions under which current is supplied to these consumers outside the City on competitive bids, why, obviously, it would require a pretty clear showing, so far as the conditions [289] are concerned, before the court could make any kind of comparison or could make the inference of discrimination.

Mr. Rader: If it please the court, even assuming all of that were shown to your Honor, the law, I think, is rather clear and I would like to read your Honor a paragraph that the fact that a private consumer, a business consumer, has no right to insist upon equality with the Federal Government or its agencies in their consumption or in their service or anything else and the fact, if you do give the Federal Government a special rate, has no bearing on private discrimination cases. I have authorities to give to your Honor to that effect. Assuming they showed it was exorbitant, it was damaging to every consumer in town, assuming they could show all of that, still the fact that it is done to the Federal Government is not a basis for these plaintiffs to say they are being discriminated against. They are not

(Testimony of Robert W. Retherford.)

operating an airport. They are not a government. The comparison is absolutely immaterial.

The Court: Well, I assume there is no dispute as to that phase of the law.

Mr. Reischling: There is a dispute to this extent: The power is not being furnished to the government, no matter what counsel says. It is being furnished to private users. The government is in the utility business under contract here, that is, the C.A.A. is a part of it. Such power as it may use for its own incidental purposes is one thing, however, such power as [290] it sells to somebody else is another. That is exactly the same argument that one might raise who said that the government ordinarily can go in and compete with private industry in any private business of any kind. I mean, in fact, this is a preferential treatment to private customers of the government. To carry this thing just a little bit further, if we could tie into the line that the City sells the power to the International Airport on we could buy power at .0282 or .0283, although the users in the community are paying at the rate of 3½ cents.

The Court: Your point is that there is a distinction between selling to the Government as a consumer and selling——

Mr. Reischling: Selling to the Government as a distributor, that is right, and as a wholesaler.

Mr. Rader: If it please the court, I assume if we get into this I will have to bring in government officials to show they wouldn't let anybody on their

(Testimony of Robert W. Retherford.)

premises to build distribution lines. They do rent property and cafe space and hangar space and things like that. This is their own distribution system and their meters and everything else and, secondly, there is a big difference between letting the United States Government sell power through its own distribution lines to consumers and letting a private apartment house corporation sell power through their own lines to consumers and the courts have so held. The courts have proved time and time again that you need not allow another private concern to come in and distribute your energy because of [291] the fact it puts that private concern in such a position to milk the public, milk their tenants, milk anyone else to arbitrarily charge any rate they want and also if charged a flat rate, which is usually done, we discourage the use of consumption of power. That is not true of the Federal Government. The Federal Government, I think we can assume, are going to treat their people reasonably and fairly. I don't care if the International Airport had a hotel on it and was sitting next door to this place out here or if they had 15 apartment houses distributed identically with these, if it was operated, run and managed by the Federal Government it would be in a completely different classification than being operated and managed and run by private persons who are not responsible to anyone except themselves.

Mr. Reischling: The restaurant out there isn't operated and run and managed by the Government.

(Testimony of Robert W. Retherford.)

The man that runs the restaurant merely has a franchise in there and he pays rent. But, after all, this isn't the Government that is in business out there. There are a number of individual consumers or customers and they are actually being favored or could be favored by buying their power at a lesser rate from the distributing system of the Government than other persons competing with them buying from the City. I say that the example that counsel gives is not apropos of the question here at all that this is discriminatory.

Mr. Rader: If it please the court, the example is this, that is, in one place we permitted the Federal Government [292] to distribute power through its own lines to individual consumers which are located on a federal reservation and who rents facilities and equipment and space from the Federal Government at the International Airport. Now, assuming that we do that, still I think that is a lot different and it is outside the City limits, it is a lot different than extending the same privilege to a private consumer, that is, of rehandling or reselling our electricity, so to speak. There is a difference between letting the Federal Government resell our electricity and between letting Panoramic View resell our electricity. In one case the Federal Government presumably, and I think the presumption is warranted, is not going to take undue advantage of the persons that they are reselling to. There is no such presumption as regards private enterprise. It could be—I am not saying they wouldn't be completely fair—but the courts and the utility commis-

(Testimony of Robert W. Retherford.)

sions which have ruled on the question generally say there is a difference and the utility company is completely justified in not allowing a private concern to redistribute energy through anything but their own facilities to the ultimate consumers. I don't have a case which says the Federal Government can but I do have a case here which says a private concern can in no wise insist upon equality of treatment with the Federal Government and that is the question here, whether or not we are going to let them resell our power.

Mr. Reischling: If the court please, I am a little bit astounded. During all of Friday counsel has been talking about primary metering and as pointed out in primary metering establishments [293] the City would own the lines and distribution system to that point. From that point on the consumer would use all of the facilities and could sell—or the power would go through his lines into the particular units.

The Court: But not sell.

Mr. Reischling: Not sell, but then that would—he is using that primary metering argument on the basis that under that guise we could get a lower declining rate as fixed by the published tariffs. Not sell, no. We would have to pay for it, but it would be a much lower rate. Again we are coming right back to a measuring problem where, if it comes through a primary meter and then is distributed, we are entitled, he contends, to a declining rate. But here, this is primarily metered and the Govern-

(Testimony of Robert W. Retherford.)

ment has gone into the distribution and retail business of selling power in competition, that is, to persons using that power in competition with other persons in the same business.

The Court: Well, the evidence that is offered here on recross-examination will have to be excluded, from my view of the law. Have you any further questions?

Mr. Reischling: That is all.

Mr. Rader: No. I wanted to do one thing though and that is——

Mr. Reischling: I mean I am through with this witness.

Mr. Rader: Before we recess I wanted to ask counsel if they would stipulate on this topographical map if we could circle [294] the International Airport in red pencil?

Mr. Reischling: Yes. (So indicated on the map.) Let's circle on the same map Panoramic View.

Mr. Rader: They are all circled. I'd like to do one other thing and that is to draw a line of the approximate City limits and I think that follows generally Chester Creek along like this (drawn on map) that the line enclosed by the red pencil and has red "X" in it is the approximate City limits at this time. Is there any objection to that?

Mr. Reischling: No objection.

The Court: We will recess for 5 minutes.

(Whereupon, at 11:15 o'clock a.m., following a 5-minutes recess, court reconvenes and the following proceedings were had.)

The Court: You may call your next witness.

Mr. Cottis: Call Floyd Reischling.

FLOYD M. REISCHLING

called as a witness for and on behalf of the plaintiffs, and, being first duly sworn, testifies as follows on

Direct Examination

Mr. Cottis: If the court please, one of the uniform rules of the District Court for Alaska, I think it is Rule 9, provides that an attorney in the case may not be a witness without special permission of the court if he intends to argue the case. [295] We ask for that permission. Mr. Reischling is president of Panoramic View Corporation and it is in that capacity we should like to obtain his testimony.

Mr. Rader: I have no objection.

The Court: It may be done.

By Mr. Cottis:

Q. Your name is Floyd M. Reischling?

A. That is correct.

Q. Mr. Reischling, how long have you been connected with the Government Hill project?

A. I have been connected with the Government Hill projects, that is, Panoramic View and Richardson Vista, from its inception. I executed the Richardson Vista lease from the Department of the Military on behalf of the Pacific-Alaska Development Corporation, I believe, in May of 1949, about that time.

(Testimony of Floyd M. Reischling.)

Q. Where is the architect that handled this matter, Mr. Reischling?

A. Mr. Gerald Fields, who was the architect and who prepared the plans and specifications, had a very serious heart attack about 3 years ago and is incapable of doing any type of work or undergo any type of strain whatsoever at this time. I believe he was hospitalized for 6 months.

Q. Now, during 1949-1950 you were engaged in fairly regular discussions with City officials concerning the problems that arose with these establishments, were you not? [296]

A. No, Mr. Cottis. I did discuss with Mayor Loussac and with Mr. Don Wilson matters and things concerning this particular project up to August of 1949, during which time the ground was broken out there for this project. Between the time that ground was broken in August of 1949 and until after the completion of this project I did not come up to Alaska at all. I did not talk with officials between those periods of time.

Q. Did you have any discussions concerning the charges for electricity that would be consumed as house current by these buildings?

A. I can answer that question this way: That at the time these particular projects were set up there was a tremendous housing shortage in this particular area and at that particular time the City of Anchorage had no funds with which to install utilities or to co-operate in any manner whatsoever toward furnishing City services to Government Hill,

(Testimony of Floyd M. Reischling.)

notwithstanding the fact that both the Mayor and the City Manager were very much desirous, in spite of the fact that they could not at that time help, they wanted to co-operate to their utmost to try to get these facilities into the Hill if possible and assured us that in every way possible they would try to give us the full benefit, whatever benefit they could to help us to get the utilities in there. I don't know any other way to put that. [297]

Q. Now, in connection with the utilities—sewer system, for example, these corporations had to supply their own, did they not?

A. That is correct, a sewer system, the water system, the sidewalks, the street lighting, power for the construction, everything had to be furnished by the builder from the time that he commenced and it was our intention, because of the inability of the City to assure us that they could or would furnish the utilities, that we would put in a generating plant ourselves.

Q. For your electrical needs?

A. For the entire project because we had to have assurance that we would have electricity and the boiler house, the heating plant had to be so designed that it would heat the 692 units included within Panoramic View and Richardson Vista and was also designed so there was additional steam. And just prior to the time that ground was broken I went down to Whittier and talked to the Commanding Officer there with reference to obtaining generators, which the Military had abandoned on either

(Testimony of Floyd M. Reischling.)

Attu or Kiska, which could be, they believed, furnished to us for the particular purpose of providing power and electrical energy for these particular projects in the event that the City would say or would determine they could not get power to us.

Q. And you yourself went to Whittier to arrange or to investigate—— [298]

A. It was because of the assurances—I met with Mr. Wilson in Washington, D. C., subsequent to that time and because of the assurances of Mr. Wilson and our belief, which I will say at that time was not based upon any particular rate schedule or utility schedule, it hadn't gotten to that detail, but their apparent willingness to co-operate in every way and their desire to have us as power users caused us to abandon the installation of our own generating equipment on that Hill.

Q. Do you know whether the City was aware of your efforts or your plans to install your own electrical generators?

A. Well, prior to ground breaking we advised the City council that we were contemplating that, oh, I'd say, months before ground was broken for this particular project.

Q. The buildings were completed and occupied during the year 1951, is that correct?

A. That is correct.

Q. Why were the buildings spaced the way that they are?

A. We obtained, as I said before, two leases, one from the Military and one from the Department of

(Testimony of Floyd M. Reischling.)

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the Interior, and Federal Housing Authority requirements fixed a density that is not more than 11 units per acre, I believe, was the maximum number of units that could be placed according to F.H.A. requirements and it was essential and necessary that we supply space for play yards, parking areas and other facilities that the people would have an outdoor area for recreational purposes. [299] The military placed a limitation of two stories on the buildings because of the closeness to the airport and I believe that restriction is still imposed by the military in all construction on Government Hill and that vicinity. They are all two-story structures.

Q. Now, on financing the projects, will you describe what, if any, mortgages were executed?

A. The Richardson Vista was transferred by the Pacific Development Corporation to Richardson Vista Corporation and a note and mortgage was executed by that corporation to secure repayment of a loan which was identical to the note and mortgage executed by Panoramic View Corporation for the 264 units that were covered by that particular mortgage on the Department of the Interior leasehold. The mortgages were identical excepting for differences in amounts. The period of repayment was exactly the same, the interest was the same, and the persons executing the mortgages for both of those corporations was the same.

Q. And there was one single mortgage for each of the two establishments?

A. One single mortgage for each establishment.

(Testimony of Floyd M. Reischling.)

A separate leasehold was taken for Panoramic View boiler house, which is down on the—just above the railroad tracks for convenience in getting fuel, coal. It was designed to eliminate having to haul ashes or having coal dumps or other unsightly [300] situations on the Hill. And I should say the boiler house by that contract must furnish heat to Richardson and to Panoramic View. That is, the units of both have a contract for the length of the leasehold period, each with the other that they will receive heat and pay their proportionate share of the cost of the production of that heat for heating purposes for both projects.

Q. In connection with taxes levied by the City of Anchorage, is each establishment treated as one taxpayer?

A. Each establishment is treated as one taxpayer. Panoramic View gets a separate bill, Richardson gets a separate bill.

Q. You heard Mrs. Hall's testimony the other day, did you not?

A. I was in the courtroom during a portion of it. I didn't hear it all.

Q. Was it with the approval of the two corporations that she offered to bear whatever expense might be necessary to get a combined electric billing?

A. As soon as it was called to the attention of the corporations that the billing apparently was different than it was thought it was going to be Mrs. Hall was asked to take such steps as she could

(Testimony of Floyd M. Reischling.)

to try to get the City to give us what at that particular time the corporations thought they were supposed to get by virtue of the understanding that had been made prior to that. She was the managing agent up here at that time. [301]

Q. And her authority, was it sufficiently broad to include committing the corporations for expenses?

A. Mrs. Hall did do that. She was the managing agent and she was instructed to bring this matter to the attention of the City and do whatever was necessary in order to get what we thought we were entitled to get.

Q. How many classes of apartments are there in these buildings?

A. Well, there is the efficiency units, the 1-bedroom, 2-bedroom and a de luxe unit which is a large 2-bedroom unit. There is approximately 45 or 50 additional feet in the de luxe unit.

Q. Is there any difference in the rentals charged tenants for the same class of apartment?

A. The units in both Panoramic View and Richardson Vista rents for exactly the same figure with reference to the, that is, the efficiency are the same, the 1 and 2 and de luxe are the same unless there has been some recent change in Richardson Vista, but they were the same up at least until Mr. Sarno acquired the Richardson Vista project. I know that the rents charged were identical for the same space.

Mr. Cottis: I have no further questions.

(Testimony of Floyd M. Reischling.)

Cross-Examination

By Mr. Rader: [302]

Q. Mr. Reischling, when did you go to Whittier?

A. I went to Whittier in August of 1949, July or August.

Q. The corporation planned to build its own distribution system?

A. The corporation was faced with the problem it might have to.

Q. You didn't want to do that?

A. Well, the corporation was building rental housing units and, of course, it didn't want to go into the utility business, but was prepared to furnish utilities if it had to do it.

Q. Did your engineers compute a cost for a generating plant and a distribution system?

A. Preliminary estimates had been made which is the reason I went down to Whittier to find out what it would cost or how we would be able to obtain these particular generators that the military had told us had been left on Attu or Kiska after the cessation of hostilities.

Q. Did the F.H.A. ever approve it?

A. No application was made to the F. H. A. to put in that particular generating equipment because by the time it was before the council—it was before July or August because by the time we had broken ground we had had signed, I believe, by the City council Resolution No. 530 by the terms of which we agreed to put in utilities, other than lights, at that time, and they would repay us over a 5-year

(Testimony of Floyd M. Reischling.)

period after completion, I believe, for the money we put in for it. But we had at that time or about that time, as I recall, been assured that [303] the City would co-operate to the fullest of their ability.

Q. But you never had your generating facilities nor your distribution line approved by the F.H.A.?

A. No, that is correct.

Q. And all the plans you submitted to the City—or do you know whether any of the plans you submitted to the City indicated any such——

A. I don't know.

Q. Let me ask you this: Under your system for supplying your own electrical power, it didn't involve any change in the wiring for any of the buildings?

A. It was prior to the wiring, I believe. It was finally submitted to the City—I don't know what the architects or engineers—as I say, they had only made some preliminary estimates and I went down to see what I could do with reference to the generators.

Q. It wouldn't make any difference as to the wiring inside the buildings as to the distribution and generating system?

A. I am not able to say.

Q. So you are not able to say whether the projects altered the wiring on their houses, if they did?

A. I am not able to say.

Q. Mr. Reischling, there are other housing units in this area. Are you familiar with Jefferson Courts and Linda Arms?

A. No, sir. [304]

(Testimony of Floyd M. Reischling.)

Q. You know though they are F.H.A. 2-story buildings?

A. I have never been in Linda Arms. I have never been in Jefferson Courts. I don't know anything about the circumstances under which they were built. I had no connection of any kind whatsoever with any of them.

Q. E & E Apartments?

A. I have never been in E & E Apartments.

Q. Have you ever been in Hollywood——

A. I have. The only time I was ever in Hollywood, I believe, was approximately at about the time that Mr. Harland came up here after Mr. Sarno had acquired the property. I had come up, too, because we were having difficulty getting a manager, too. Mrs. Hall had left and I went in to look at it only for the purpose of determining what type of maintenance had been done there. That is all.

Q. At any rate, you are not intimately familiar with it?

A. I don't know anything about it, no.

Q. Actually your testimony is substantially that in reliance upon the City Mayor's statement and the one City Manager of their desire to co-operate that you didn't put in your own facilities?

A. That is about it. As I told Mr. Cottis, at that particular time it was far too early to talk about application of rate fixing or anything of that kind. That was something far in the future, but when I talked to them their attitude was very co-operative.

(Testimony of Floyd M. Reischling.)

They wanted to do whatever they possibly [305] could to help.

Q. You state Mrs. Hall was authorized to go to the City after she got the incorrect billings, which she considered incorrect billings to try to straighten it out?

A. That was her duty and responsibility as management agent.

Q. Isn't it a fact the reason you didn't put in your generating facilities and own distribution system is because it appeared to be much more economical to you to take power from the City as a businessman?

A. Well, I don't know. I know that we didn't want to go into the utility business if we didn't have to go into the utility business.

Q. What were the instructions of your firm to Mrs. Hall as to what she should do about the billings, precisely?

A. Well, now——

Q. Let me put it like this: Did you authorize her to let contracts for the construction of an independent distribution system to serve the house meters?

A. There was a meeting of the directors of these two corporations in Washington as soon as we had been advised that the City had taken the position that each one of these buildings was a separate and independent customer. That came as quite a surprise because that was contrary to what we had been led to expect. Mrs. Hall was immediately told to go and protest and to bring with her the counsel

(Testimony of Floyd M. Reischling.)

for the corporations who [306] had been acting for them at that particular time and to report back. That is what she did. And from that particular time on all I can tell you is that there has been a number of attempts made on behalf—rather, by the management agent for the corporations to get what we believed to be the just and fair rate to which we were entitled.

Q. Mr. Reischling, where is your office?

A. At 452 Central Building in Seattle, Washington.

Q. I think you told me you had some familiarity with housing projects in Seattle?

A. I represent several, that is, as counsel.

Mr. Rader: If the court will excuse me for just a second.

The Court: We will recess at this time. If there is no objection we will resume at 1:30.

(Whereupon, at 11:50 o'clock a.m. the court continues the cause to 1:30 p.m. of the same day.)

(At 1:30 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

Cross-Examination
(Continued)

By Mr. Rader: [307]

Q. Mr. Reischling, I think you stated you were counsel for several projects in Seattle?

A. That is correct.

(Testimony of Floyd M. Reischling.)

Q. Lakeshore? A. No.

Q. Buren? A. No.

Q. Lockhaven?

A. Yes, I am counsel for Lockhaven.

Q. Mr. Reischling, are you able to tell me whether or not the Lockhaven Apartment development there has received notice that when their present contract expires they will no longer receive combined billings?

A. No, I do not know that.

Q. I assume you are familiar with the ordinances of the City of Seattle?

A. Well, no, I am not, counsel. There are about 10,000 of them, I believe.

Q. That is a rather foolish question. I withdraw it. I am handing you Defendant's Exhibit M for identification and ask you if you recognize the document?

A. Well, I can tell you now, counsel, that I do not. It purports to be a photostat, but I don't know what it is.

Q. Have you ever seen that ordinance before?

A. Not to my recollection. [308]

Q. Mr. Reischling, do you know Mr. Mason LaZelle?

A. I am sure that I met Mr. Mason LaZelle before, but I know that I met him about 2 nights ago and talked with him about 2 nights ago, 3 nights ago.

Q. Who was present at that time?

Mr. Cottis: Your Honor, I can't see the materiality of this.

(Testimony of Floyd M. Reischling.)

The Court: It isn't material by itself but I imagine it is introductory.

Mr. Cottis: Well, I object as being outside the scope of the direct testimony.

The Court: It wouldn't be if it is for the purpose of laying the foundation for impeachment and that is what it sounds like.

Mr. Cottis: Very well.

A. Mr. Hellenthal and myself, and I believe Mr. Retherford, and I believe Mr. Cottis, and maybe Mr. Maffei was there.

Q. Mr. Retherford was there?

A. Yes, I believe that he was.

Q. Where was that?

A. In Mr. Hellenthal's office.

Q. Was that Friday night?

A. Well, could have been Thursday or Friday night.

Q. Did he say anything to you about taking a trip out of town, [309] not being available for this trial?

A. Did he say that to me?

Q. Well, in your presence?

A. Well, I can't recall that but I left. I don't know. I don't remember. I didn't call Mr. LaZelle in there, do you understand?

Q. Yes, I understand that.

A. And I heard some of the conversation with Mr. LaZelle and Mr. Retherford and Mr. Hellenthal but I can't recall his saying that he was going to go out of town or that he was not going to be out of town. I don't remember anything about that.

(Testimony of Floyd M. Reischling.)

Q. Were you there during the complete time, at that meeting?

A. As I recall, I was in and out of his office. I do not believe I was there the complete time. There is a coffee shop down on the corner and I think I did go out and have coffee at one time.

Q. You had occasion to discuss the possibility of his testifying in this case and what his testimony might be?

A. No. I will tell you the result of my conversation with him, that is, the questions I asked him that I recall definitely were with respect to this National Safety Electrical Code and I asked him what sections in that National Safety Electrical Code, if any, would prohibit combined billing and he said there were none and he had never said there were any that prohibited combined billing. I believe he told me the [310] only sections that had to do with single entry service were 2301. That was the particular section which had been discussed before as having reference to the particular problem of metering.

Q. In your discussion with Mr. LaZelle or while you were present did anyone else discuss his testimony?

Mr. Cottis: Your Honor, I make the same objection that I did before.

The Court: I don't know what this is leading up to. It all seems immaterial.

Mr. Rader: If it please the court, there was a good deal of testimony by Mrs. Hall as to her con-

(Testimony of Floyd M. Reischling.)

Conversation with Mason LaZelle at the time he was employed by the City. Since his employment—well, he was discharged or quit or at least the relationship expired existing between Mr. LaZelle, we have a subpoena for him and suddenly find he has left town. I merely wanted to find out. I don't know why he left town, but at any rate this is merely a preface to the testimony later on to the effect he is unavailable to us.

The Court: All you need to do to show a witness is unavailable is to put someone on the stand and state he is out of town or perhaps you can get an agreement here of the parties.

Mr. Rader: I thought perhaps Mr. Reischling would have knowledge of the fact that he is out of town. If he did I could make the showing right now. [311]

The Court: You should ask the question directly instead of going about it in such a round about way and time consuming way.

Mr. Rader: I have no further questions.

Q. (By Mr. Cottis): Mr. Reischling, did you know that Mr. LaZelle was leaving town?

A. I didn't know it until counsel made the statement in court just now.

Mr. Cottis: I have no further questions.

(Whereupon, the witness was excused and left the stand.)

Mr. Reischling: If the court please, just immediately after adjournment at noontime counsel and I,

I think, agreed that we could stipulate that Mr. James St. Amour, whom we have called as a witness, would testify that he is the present manager of Panoramic View Corporation; that he had taken pictures of the meter boards in 3 of the buildings which are illustrative and exactly similar to the meter boards in all of the buildings, that is, one of the photographs contains 23 meters and I will hand that to the Clerk and ask her if she will mark that as an exhibit.

Deputy Clerk: Plaintiff's Exhibit No. 6.

Mr. Reischling: Exhibit 6 is the meter boards of all of the buildings in Richardson Vista, that is, the 19 buildings and of the six 22-, the eight 22-unit buildings in Panoramic View. Exhibit 7 is a picture of the meter board that exists in the four [312] 16-unit buildings in Panoramic View and Exhibit 8 is a photograph of the meter board that exists in the two 12-unit buildings in Panoramic View. If the court please, I offer these in evidence. I also have a typical recap of the utility bill which is furnished to Panoramic View each month, this particular one that I have in my hand is dated July, 1954. The first line of which takes care of the power that is used in the Panoramic View boiler house. The next line is the water bill for Panoramic View and the next—

The Court: Does the exhibit show that?

Mr. Reischling: It doesn't so state. That is why I have read it in the record. The next 14 lines are for the meters that are billed to Panoramic View for the house current, one of the meters being an

apartment meter in which Panoramic View's rental office is located. I would like to have that marked as Exhibit 9. Let the record also show that Panoramic View receives 14 blue tickets showing the amount of power consumed in each of the Panoramic View buildings from which this compilation is made and it also receives, I believe, a blue ticket for the power consumed in the boiler house, so this is actually a compilation of all of the power furnished to Panoramic View plus the water which comes on this for house current only; the tenants' bills being billed to the tenants separately and with which Panoramic View has no concern.

Mr. Rader: If it please the court, in line with that [313] will counsel also stipulate that the only reason that the City made this recap was at the request of the rental agent for the corporation instead of sending merely the blue bills, which is done for all other users—that at the request of your rental agent we consolidated it for them so they would have a record.

Mr. Reischling: Well, counsel, I can't stipulate that they did it for that reason. I just say they have been doing it for more than a year and a half. I don't know the reason. I just know we get that each month.

Mr. Cottis: I think they have always done it and I don't know the reason either.

Mr. Rader: The thing of it is, if you introduced this through Mrs. Hall or some other—whoever the agent was at the time this practice was instituted and I have to assume that would be the way you

would introduce it—by the testimony I think it would be it was done at the request of your people for your convenience.

Mr. Reischling: I do not know. Of course, we could put it in by your witness. He might have his reasons for it or explanation, but I don't know the reason. Your Honor, we just get those bills.

Mr. Cottis: If the court please, will counsel stipulate that the same situation applies to Richardson Vista in principle except for the number of units and so on?

Mr. Reischling: If your Honor please, I would also [314] like to have marked as Exhibit 10 Ordinance No. 283 of the City of Anchorage which was passed and approved on the 24th day of August, 1949, by the council and mayor of the City of Seattle and repeals in Section A-6, Sections 7 to 29, inclusive, of Ordinance No. 55.

The Court: Repeals what sections?

Mr. Reischling: Sections 7 to 29, inclusive, of Ordinance No. 55 which ordinance is Exhibit I in evidence.

The Court: Well, you are speaking of the City of Seattle?

Mr. Reischling: Did I say Seattle? I am sorry—the City of Anchorage. When I speak of city it is automatic to say Seattle. I will offer Exhibit 10 into evidence.

Mr. Rader: Could I look at that for just a second?

Mr. Reischling: Yes. I believe that is a copy furnished us by you, counselor—I am not sure.

Mr. Rader: Did you say Section A-6?

Mr. Reischling: Yes. I can show it to you, counselor.

Mr. Rader: If it please the court, this is the first time I have seen Ordinance 283 and particularly the sections pointed out by counsel. I have no reason to think that what he says about the ordinance is not true, however, I would like the opportunity to check our City Hall records on it.

The Court: Well, as I understand it, then you have no objection but with the reservation that you may be given an [315] opportunity to make an objection later should your investigation——

Mr. Rader: Yes.

The Court: Very well.

Mr. Reischling: Plaintiffs rest.

Mr. Rader: It appears that the sections referred to by counsel are a part of that ordinance, but were never made a part of the code, the general code. At least to my knowledge it is not a part of the general code and for that reason it makes me think that perhaps that ordinance wasn't enacted or that there might have been some changes in it, but I will have to check it.

Mr. Reischling: Plaintiffs rest, your Honor.

Mr. Rader: If it please the court, if that is the close of plaintiff's case I would like to ask for a 10-minute recess in order to check this ordinance because I intend to move for a dismissal at this time and I wanted to argue the matter if your Honor would hear it and this ordinance has a bearing on the argument.

The Court: Well, as I understand it, then you are not able to go ahead with the argument until you check on this ordinance?

Mr. Rader: Without checking on the ordinance, that is correct, your Honor. I don't think it will take me more than 10 minutes to go to the City Clerk and ask him for the original of that and see if it was enacted.

The Court: Well, but what about calling from here? In [316] other words, why not have somebody else look it up instead of you looking it up?

Mr. Rader: All right. With counsel's permission, I would borrow the exhibit.

The Court: Now, is there anybody over at the City Hall who could give you an answer on that immediately?

Mr. Rader: I believe so, your Honor. The ordinances, or old ordinances which pre-date the Anchorage General Code I believe are consecutively numbered, but they are not indexed, the ordinances are not, and I think that with this ordinance number they will be able to ascertain whether or not the ordinance was enacted.

Mr. Reischling: Well, under the circumstances, your Honor, I join with counsel in asking for a recess because I also would like to be present when that is checked.

The Court: I was just thinking that probably that couldn't be ascertained in less than 10 minutes so perhaps we should recess for 10 minutes.

(Whereupon, at 2:10 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had.)

Mr. Rader: If it please the court, Plaintiffs' Exhibit No. 10, Ordinance 283 which repeals the major portion of Ordinance 55—Ordinance 55 is the ordinance enacted in 1925 by the City of Anchorage and was apparently in effect until 1949 when it was [317] repealed by Ordinance 283. I believe that in our stipulation at the beginning of the trial we stipulated that all provisions of the Anchorage General Code, dated April 12, 1950, as having been enacted as an entire code, was agreed that it would be considered as in evidence as public utility regulations and I think that counsel will stipulate. If he will not I would appreciate his pointing out to me the fact that if the codification as published and as acted upon does not contain a repeal of Ordinance No. 55, although it appears it was validly repealed in 1949, the year previously. Frankly, this comes as quite a surprise to me because of the fact that I had no knowledge and no indexing or method of arriving at this Ordinance 283 and knowing that it contained a repeal in part of Ordinance 55.

The Court: But now is Ordinance 55 one of those in the Code?

Mr. Rader: No, it is not one of those in the Code.

The Court: Was the Code enacted as a code?

Mr. Rader: It was but there was no repeal of—at least to my knowledge—I looked in the Code and I could find no general repealing statute or general

repealing provision, although it does state that certain enumerated ordinances are to be considered in addition to the code.

The Court: Well, then, the question of implied repeal is presented.

Mr. Rader: There is no doubt it was impliedly repealed [318] by the code. The question is whether it actually was repealed, but then that question is no longer, I guess, necessary because of the fact that plaintiffs have produced actually the repealing ordinance of 1949 which predates the code.

The Court: Well, I still am unable to understand what you are surprised by. If that is the case what is it that surprises you?

Mr. Rader: I am surprised by the fact it was repealed, actually.

Mr. Reischling: If the court please, may I suggest that counsel was relying on Ordinance 55 not knowing that Ordinance 55 had been repealed and that is why this is a surprise to counsel today?

The Court: But it seems to me it would be impliedly repealed by the enactment of the code.

Mr. Rader: It could have been and it may have been. I don't know, but apparently the previous City attorneys and the utility company in operation have not considered it as being repealed.

The Court: You mean operating under it?

Mr. Rader: They have been operating—some parts of the ordinance have been repealed and changed. Some of the procedure has been changed by subsequently enacted ordinances and matters which are contained in the agreed code and the

amendment to the agreed code by the council to date since 1950, but the important [319] sections of Section 55 are those which were repealed and nothing was replaced. In other words, it was apparently repealed in 1949 during the time Mr. Hellenthal was City attorney and nothing was enacted to replace it. I suppose that it puts the utility company in a situation as having operated completely without any ordinance as to the matters in essential dispute in this action. However, I am not certain that what I am saying has too much bearing on the question because I am prepared still to argue my motion to dismiss on the evidence presented thus far as to discrimination.

The Court: I don't know yet—nobody has apprised me what it is that Ordinance 55 provides for.

Mr. Rader: Ordinance 55, if it please the court, Section 22, "Supply to separate premises through separate meters. In no event will separate premises, even though owned by the same consumer, be supplied with electricity through the same meter or meters." That is Section 22. Section 24, "Readings of separate meters not combined. For the purpose of making charges all meters upon the consumer's premises shall be considered separately and the readings thereof shall not be combined, except that where the City shall, for operating convenience, install upon the consumer's premises, in place of one meter, two or more meters, then the readings of such two or more meters shall be combined for the purpose of making charges." But, frankly, I don't know what the effect of operating without any

ordinance whatsoever amounts to in the legal significance of this thing, but I don't think it can [320] have too much effect under the law of the case because of the fact that there is no showing—the plaintiffs have only mentioned one instance where they thought that anybody was being treated any differently than themselves and that was the case of International Airport. I am prepared to argue the law on it and am also prepared to go into some of the cases on it if your Honor wants to listen to it.

The Court: Well, you said you wanted to argue a motion so if you want to argue, go ahead.

(Whereupon, arguments on motion to dismiss were made by Mr. Rader, Mr. Reischling, Mr. Cottis and Mr. Rader.)

The Court: If that is all to be said in connection with the motion, the court will deny the motion. You may proceed with the defendant's case.

Mr. Rader: Mr. Nichols, will you take the stand, please?

GEORGE W. NICHOLS

called as a witness for and on behalf of the defendant and, being first duly sworn, testifies as follows:

Mr. Cottis: Your Honor, before the testimony starts I would very much appreciate getting one thing cleared up. Under the direction of the court to produce things we have been lugging back and forth building plans and maps and all that sort of thing and I take this position, if the City wants them, the City [321] can do the lugging from now

(Testimony of George W. Nichols.)

on, but I'd like to be excused from dragging them into court every day.

The Court: Well, I think you are correct in that stand. You produced them so——

Mr. Rader: It seems to me like I asked Mr. Hellenthal if he wanted me to take them with me and he said no that he would take care of them.

Mr. Cottis: I revoke that.

Direct Examination

By Mr. Rader:

Q. Mr. Nichols, will you give us your occupation, please? A. I am the City Comptroller.

Q. As such you have charge of the billing for the City electrical utilities?

A. That is correct.

Q. Mr. Nichols, how long has the present billing practice been in effect to the best of your knowledge?

A. To the best of my knowledge, it has been in effect since I have been employed by the City, which is April, 1950. I have no knowledge prior to that time.

Q. What is that policy insofar as meters are concerned? A. Each meter——

Mr. Cottis: If the court please, I object unless this policy is the policy that existed when this construction was going [322] on. The policy that the City inaugurated or things it inaugurated in November of 1951 when it turned down our request

(Testimony of George W. Nichols.)

leading to this litigation I submit has no bearing at all. That is why we are in court because they said at that time, "We are going from now on to make it our policy to do such and such." I object further on the ground that the City policy is not expressed by what they do in a matter like this, but by what their ordinances, resolutions, tariffs and schedules recite.

The Court: Well, I think that we are kind of quibbling about words. Now, we can call it practice and probably there wouldn't be the same objection although it would mean the same thing when it refers to this method of billing, but so far as the duration of this policy or practice is concerned I don't see where that is particularly material. Practically all of your case depends on or involves the period after 1950 and so far it would appear that whether you called this "policy" or "practice" that it has been in effect for a considerable length of time and there is nothing to negative its existence previous to 1950. And from what has been said here and what has been done it would appear that it was in effect from the time, you might say, that this project was first initiated or at least when there were some discussions as to the rate that would apply. Now, of course, since there weren't other apartments or comparable establishments, so to speak, it might be that you couldn't label it as a policy at that time, but again I think that it is just a quibbling of [323] words. It is immaterial whether it is policy or practice. I think that its legal effect

(Testimony of George W. Nichols.)

would be the same and would have to be governed by the same legal principles. Objection overruled.

Q. I think you stated the policy was metering a separate bill, or would you state it, please?

A. It has been our practice to rate each meter individually. By that I mean whether a customer has one or twenty meters each meter is rated individually. We start at the top rate and work down again rating them through regardless of location.

Q. Now, Mr. Nichols, when did you say you were employed with the City? A. April, 1950.

Q. At that time, Mr. Nichols, were there any 2-story apartment houses or dwellings located in the City of Anchorage and served by the City utility wherein each apartment building housed one meter and each of the tenants had separate meters?

A. Yes. The Alaska Housing Authority has a project at 13th and "I" Street. There is four multiple unit dwellings on that particular part of ground.

Q. Would you describe to us that project physically?

A. There are three of the units facing "I" Street and they have access roads between those and one, I believe, is facing towards the access road with its back towards 12th Street.

Q. Those buildings are two stories? [324]

A. They are two stories, yes, sir.

Q. Do you have any idea of the number of apartments in each building?

A. I would say approximately 16 units in each building.

(Testimony of George W. Nichols.)

Q. And each of those apartments has a separate electrical meter? A. That is correct.

Q. And for each one of the apartment buildings there is a house meter?

A. There is, yes, sir.

Q. And what was the policy in regard to billing of the house meters?

A. Those units were erected in 1946 and as far as I can determine from the meter books they have been rated individually since that time.

Q. Now, since you came with the City, are you able to say they definitely have been metered individually? A. Yes.

Q. What do you mean so far as you are able to determine from the meter books?

A. Our billing record is a meter books which contains the location and the meter readers put in the number and subsequent readings on that. Each one is rated as individual meters.

Q. Then, according to the City records, as to billing the same policy has been followed since your employment by the City, at least it was followed in the case of Alaska Housing [325] Authority units prior to your coming and up to 1946, is that correct? A. Yes, sir.

Q. Mr. Nichols, can you tell us the number of persons taking commercial services from the City who have multiple meters and if you wish to you may refer to your notes?

Mr. Reischling: I object, if the court please. It

(Testimony of George W. Nichols.)

is immaterial and irrelevant. It has no bearing on the issues in this case.

Mr. Rader: If it please the court, the testimony would be principally that there are 90 other persons who have, maybe, on an average of 3 meters apiece, which are not combined. They are under the same schedule as the plaintiffs.

The Court: But would their situations otherwise be comparable because if not it wouldn't have much value.

Mr. Rader: I will admit, your Honor, we haven't been able to go through for that. The reason for showing this was to show that if you adopted the policy of one consumer, having all of his meters combined, that you would end up with, oh, combining 498 meters or something like that for 205 persons. In other words——

The Court: Well, I think you are entitled to show that these apartment house projects aren't the only ones against whom the billing is made in the manner testified to.

Mr. Rader: That is what it would be for [326] precisely.

The Court: As I say, for it to be of any value these other establishments would have to be shown to be comparable, at least in a general way.

Mr. Rader: Well, if it please the court, the only comparable project, other than those mentioned by plaintiffs witnesses, is the Alaska Housing and we have already testified to that. So far as I know there are no other comparable projects in town, but

(Testimony of George W. Nichols.)

this would be only for the simple thing of combined metering for the practice of combining meter readings.

The Court: - I should think that possibly it should be shown just what kind of establishments these others are. In other words, why do they have a multiplicity of meters? I don't know from what has been said here thus far by this witness.

Mr. Rader: I don't believe this witness could testify as to the whys and wherefores on meters.

The Court: Well, it would still be admissible, but its weight, of course, would be affected somewhat by now showing the character of these establishments.

Q. (By Mr. Rader): Mr. Nichols, a person coming under domestic services, how many persons do you have that have multiple meters?

A. Under domestic services?

Q. Excuse me, under commercial services first?

A. Under commercial services we have 90 and that varies from 2 to 17 meters per establishment and those establishments are [327] situated either under one roof or on adjoining pieces of property and limited to 3 city lots in size.

Q. And how about the domestic services?

A. Domestic services, there are 95 having from 2 to 11 meters under the same geographical conditions.

Q. And of other classifications there would be 15 or 18 more persons? A. 19.

Q. 19 more persons that would have combined

(Testimony of George W. Nichols.)

meters? A. Yes.

Q. Mr. Nichols, what per cent of our total number of consumers would you estimate have multi-meters but each meter is computed separately? Could you make an estimate on that?

A. You mean having the same location or different location?

Q. Well, just multiple meters.

Mr. Cottis: I object. It is immaterial.

The Court: Well, I think that this showing is not improper because as I see it it would tend to negative the implication of lack of uniformity or discrimination. That is, the more properties that are served and built in a similar manner the more weight the evidence, the contention would have that there is no discrimination, the practice is uniform. Objection overruled.

A. Due to ownership of one individual or one corporation of more than one piece of property it would probably run at least 10 per cent of our customers who would have multiple [328] meters. That would be roughly 600 customers.

Q. And on any of those are the meter readings combined for the purpose of computing the applicable rate? A. No, sir.

Mr. Rader: That is all.

(Testimony of George W. Nichols.)

Cross-Examination

By Mr. Cottis:

Q. How many of these establishments, Mr. Nichols, were under single ownership and still possessed multiple meters in the summer of 1951? Do you know?

A. No, sir, I don't. These figures are as of December 31. I would name you a few of them but I don't know the number at that date.

Q. December 31 of what year? A. '54.

Q. Do you know of any establishment within the city under one ownership which was energized after the repeal of the Ordinance 55 in August of 1949 where multiple meters were installed before the beginning of this lawsuit?

A. E & E Housing Corporation, Jefferson Courts.

Q. No, they were long after this—if you will excuse me. This lawsuit was started in January of 1952, so do you know [329] of anybody other than Richardson Vista and Panoramic View, possibly Hollywood Vista, which has been paying the charges under protest that fell into that category between August of 1949 and January, 1952?

A. The New Westward Hotel would be one.

Q. When was that?

A. I only know that it was built during that period. I don't recall the exact date it was built.

Q. That is, the new portion of the hotel has a separate meter from the old portion, is that correct?

(Testimony of George W. Nichols.)

A. That is correct and they have multiple meters within that unit now. They have 7 meters now.

Q. That is a leased out restaurant and the lessee has one meter and that sort of thing?

A. No, sir, 7 billed to the Westward Corporation.

Q. Why do they have 7 separate meters, if you know?

Mr. Rader: If it please the court, this witness did not testify as an expert on why they have 7 separate meters or anything else. His only testimony was generally as to billing, that there are so many persons to so many separate meters. I think it is going considerably beyond the direct.

The Court: Yes, I think all his testimony is merely statistical so——

Q. (By Mr. Cottis): Are the 7 separate meters for the Westward Corporation all on [330] the commercial rate, Schedule C Rate?

A. Yes, sir, under C-1 Schedule.

Q. The whole 7? A. Yes.

Q. (By Mr. Reischling): Mr. Nichols, maybe I got the figures wrong but I have it that you said 205 individuals, that is, persons having 495 meters in this combined billing. Is that correct?

A. Those would be people that are under one roof or situated on approximately 21,000 square feet.

Q. And of the 205 persons you said that it was divided into a commercial service and under commercial service you had installations run from 2 to 17 meters, is that correct? A. Yes, sir.

(Testimony of George W. Nichols.)

Q. How many are there in that category?

A. 90.

Q. Now, so I understand correctly; in that category all of these people are their meter readings combined and they are given one bill?

A. No, sir.

Q. They are not?

A. No, sir. Their meter readings are rated individually for each meter.

Q. The readings are not combined?

A. No, sir. [331]

Q. And that is also true of the domestic users, the 95 I believe that you said?

A. That is correct.

Mr. Reischling: That is all.

Mr. Rader: I believe that is all. Excuse me, one more question.

Redirect Examination

By Mr. Rader:

Q. Mr. Nichols, perhaps I misunderstood Mr. Cottis' question but Alaska Housing Authority—to make this clear how has Alaska Authority authority with its 2-story apartment buildings out there, there are 3 or 4 of them, they have been consistently billed the same way since 1946. Is that not true?

A. As far as I can tell from our records, yes, sir.

Q. And you know it to be a fact since 1950 from your personal knowledge?

A. That is right.

Q. And that is in the same manner as Panoramic View Corporation and Richardson Vista are billed

(Testimony of George W. Nichols.)

and have been billed? A. Yes, sir.

Mr. Rader: That is all. [332]

Recross-Examination

By Mr. Reischling:

Q. In connection with that, Mr. Nichols, you know Mr. Glenn Wilder, do you not?

A. Yes, sir.

Q. Did Mr. Glenn Wilder come down to you and discuss with you the getting of combined billing for Alaska Housing Authority units approximately 21½ years ago?

A. He did not discuss it with me, no.

Q. You know that he did discuss it with the City Manager, do you not? A. Not that I know of.

Q. You didn't hear that at all?

A. No, I have no knowledge of it.

Mr. Rader: At any rate, he has never been given combined billing.

A. No, he has not been given combined billing.

Mr. Reischling: That is a Government operation, is it not, the Alaska Housing Authority?

A. I am not sure just exactly what operation that is. I understand that it is not a federal agency—that it is not specifically a federal [333] agency.

Mr. Reischling: It is under the jurisdiction of the United States Government, is it not?

Mr. Rader: The court can take judicial notice

(Testimony of George W. Nichols.)

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of that, I believe, and we can point that out by statute.

Mr. Reischling: Isn't that so or do you know?

A. I do not know the setup.

Mr. Reischling: That is all.

(Thereupon, the witness was excused and left the stand.)

The Court: We will adjourn to 10:00 o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock p.m., court was adjourned to the following morning, March 29, 1955, at the hour of 10:00 o'clock a.m.) [334]

Mr. Reischling: May it please the court, I received a telegram this morning, as did other counsel, from Mr. Herman Sarno who testified as a witness the other day and I would like to read it into the record. The telegram is dated Hollywood, California, March 29.

The Court: It is agreeable now it may be read into the record?

Mr. Rader: Yes, it is a correction of the testimony.

The Court: I thought you would insist on the right to impeach. If not, go ahead and read it into the record.

Mr. Reischling: It is addressed to me, c/o Justice Folta, Courtroom, United States Courthouse, Anchorage. "This telegram to Justice Folta. Have just asserted an error in my testimony of

Richardson against Anchorage. Respectfully request change to be requested in record. Fact is Kenwood Gardens, Toledo, Ohio, did not receive combined billing and is individually metered. Copy this wire going to all attorneys. Please accept my thanks in advance for your kind cooperation. Request that you record this accordingly. Signed Herman B. Sarno.”

The Court: You may call your next witness.

Mr. Rader: Call Mr. Reuss.

WILLARD H. REUSS

called as a witness for and on behalf of the defendant, and being [336] first duly sworn, testifies as follows on

Direct Examination

By Mr. Rader:

Q. Would you give us your full name and spell your last name?

A. Willard H. Reuss. That is spelled R-e-u-s-s.

Q. Give us your occupation?

A. Electrical Engineer.

Q. In what states are you licensed as an electrical engineer?

Mr. Reichling: The Plaintiff Panoramic View will accept Mr. Reuss' qualifications as an engineer.

Mr. Rader: How about as a rate analyst?

Mr. Reichling: And as a rate analyst. This is not a rate case, however, and at this time and for the record I will object to any testimony relating to the rates or fixing of rates, that not being in issue in this case. It is, therefore, irrelevant and imma-

(Testimony of Willard H. Reuss.)

terial, inconsequential, has no bearing upon the issues whatsoever and I will ask that the objection if overruled that the record show that it go to the entire testimony with regard to any rates or rate fixing.

The Court: I am wondering how it can be said that the matter of rates is not involved.

Mr. Reischling: I beg your pardon.

The Court: The contention of discrimination would necessarily involve rates.

Mr. Reischling: If the court please, as I have tried to [337] point out we are talking about the application of a published rate which is clearly distinguishable from the making or fixing of a rate. Based upon a capital investment we are not trying the rate.

The Court: Of course, that is true, but it seems to me that it is impossible to separate from the controversy the matter of what rate is to be applied.

Mr. Reischling: Well, under the law the City knows and we have submitted cases as to what is the most favorable rate that they can apply to each individual class of customers.

The Court: But have you anywhere set forth, even by way of oral argument, what you contend the rate is that should be applied here?

Mr. Reischling: We have in evidence Exhibits C, D, E, F and G, I believe the published rate schedules which apply to the various classifications of customers and as to which particular rate we are

(Testimony of Willard H. Reuss.)

entitled to get would depend upon the interpretation of that, let's say, particular published——

The Court: Certainly, but you have a contention in that respect. Don't you contend that so and so should be the rate?

Mr. Reischling: Under the law we do not have to do that.

The Court: You don't have to but don't you do so in this case?

Mr. Reischling: We are talking about the most favorable rate that is published, not something else.

The Court: Do you have anything to say as to qualifying [338] this witness as a rate analyst?

Mr. Rader: Well, I can qualify him as a rate analyst and I intended to because what I intended to show by the witness, your Honor, is generally—that is, his experience as to one custom and usage in the various states and with various public power projects as to metering and billing. I wanted to also show the difficulties of primary metering as requested by plaintiffs and his opinion as to the same in the instant case under the present circumstances. I intended to show the error in plaintiff's argument throughout this case and that is the figuring of rates upon what is known as incremental cost, being the cost which is added to the utility to serve a particular customer as showing that that being generally inapplicable in the present situation and not considered a proper rate practice generally in the United States, with exception. There are exceptions to all of these things. I intended to show

(Testimony of Willard H. Reuss.)

the different types of primary metering and their applicability to the present case or inapplicability.

The Court: Well, the objection will be overruled. What about the other plaintiff. Is the other plaintiff willing to admit the witness' qualifications?

Mr. Cottis: Your Honor, I know nothing about Mr. Reuss. I would like to have him qualified.

The Court: Then, of course, the stipulation on behalf of the other plaintiff as to his qualifications as an electrical [339] engineer serves no purpose unless both plaintiffs join. So you will have to qualify him.

Mr. Reischling: May I just for the record once more, my further objection to any testimony on this light goes to the fact it hasn't been set forth in the Answer in any way and that, therefore, is outside the issues as drawn in this proceeding.

The Court: Objection overruled. It doesn't have to be set out by answer.

Q. (By Mr. Rader): Mr. Reuss, would you tell us what states you are licensed as an electrical engineer?

A. Wisconsin, Nebraska, Mississippi, Louisiana, Colorado.

Q. Would you give us your experience briefly or—will the court permit me to lead. You were employed at one time by the Wisconsin Power Commission?

A. Wisconsin Public Service Commission.

Q. And that is a regulatory agency of the state of Wisconsin?

A. That is correct.

(Testimony of Willard H. Reuss.)

Q. Regulating power rates?

A. Regulating public utilities including electricity, telephone, water, gas.

Q. And how long did you work for them?

A. About 8 years, from 1934 to about 1942.

Q. And in that capacity did you have occasion to treat with, examine and familiarize yourself with rate application and [340] rate studies and rate analysis for electrical utilities?

A. Yes, sir. I might qualify that to this extent, that the duties of the engineering department was to prepare evaluations and for the purpose of making rate basis for the utilities, also the evaluation is in order to set up their plant.

Q. I believe I omitted—would you give us your educational background, please?

A. I have my BS and MS degree in electrical engineering from the University of Wisconsin.

Q. After the cessation of your employment with the Wisconsin Public Service Commission in what capacity or what was your occupation?

A. In May of 1942 I went with the firm of R. W. Beck Associates where I was hired as evaluation engineer. I have progressed in their organization up to principal engineer and am now present manager of their Columbus office.

Q. How many engineers are employed by your concern?

A. About 27. In addition to that we have about 9 analysts and probably a total of about 65 employees.

(Testimony of Willard H. Reuss.)

Q. Does your firm do work in the majority of the states?

A. Well, we do work as far north as Fairbanks, Alaska, and as far south as Key West, Florida. I don't know—we have worked in every state in the Union, but we have worked principally in the states of Washington, Nebraska, Louisiana, and Florida although we have done work in other states [341] which is Mississippi and Iowa.

Q. Would you describe the functions of your firm, what they do?

A. Our functions are very detailed. We make feasibility reports for financing which requires that we investigate the rate structures of utilities. We make comprehensive engineering reports for public power districts which requires a review of the reasonableness of rates. We are continuously in consultation with clients on the operation and management of public utilities as, for example, Nebraska we are working on a feasibility report now which is a combination flood control, irrigation and power which in respect to the power we are negotiating a power contract with the Nebraska Public Power System. We also make rate studies. Some of the most recent rate studies which I have made is for the Cohama Electric Power Association in Mississippi and am presently engaged in making a rate study for the Delta Power Association.

Q. Where is that?

A. That is in Greenwood, Mississippi. We have made rate studies for the City of Key West. In

(Testimony of Willard H. Reuss.)

accordance with their bond resolution we have to approve all of their rates and rate policies.

Q. Is your firm nationally recognized by bonding authorities for financing purposes?

A. Yes, our reports are used in numerous instances for the financing of revenue bonds and some of the bonding houses which [342] have relied on our reports are John DeVanco and P. J. Banks and others. One feasibility report that was made was for the Rock Island Dam down in Washington which involved about forty million dollars.

Q. Does a considerable part of your work have to do with public utilities and more specifically municipalities owned and operated utilities?

Mr. Cottis: Your Honor, it is not clear to me now whether counsel is referring to Mr. Reuss' own work or to the firm's own work. I will stipulate the qualifications of the firm of Beck and Associates.

Q. As to your own work?

A. It is mostly in a supervisory——

The Court: Does he act in a supervisory capacity as far as the firm is concerned?

Q. In your firm you are third in command?

A. Well, the chief engineer is Mr. Beck then there are two principal engineers, myself and Mr. Wallace.

Q. In that capacity you are in a supervisory relationship to the rest of the persons in the firm?

A. I am for the Columbus office which handles certain business in the area which is Consumers

(Testimony of Willard H. Reuss.)

Public Power District and Public Power District in Nebraska. My job is to also take care of the city of Key West and also the City of LaFayette, Louisiana. Those are clients of which we are on continuous engineering [343] basis. And I might add all the mid-state reclamation districts which is a combination of flood control, power and irrigation projects. May I add this to that, it is the policy of our firm to ship personnel as they are needed in various areas and that is probably the reason that I am up here.

Q. Actually you intend to work all over the country where you are needed?

A. That is correct.

Q. Your firm also operates as construction engineers, do they not, or supervising engineers?

A. Yes.

Q. Supervisory personnel for power plants?

A. That is right. At present we have two projects out of my office. That is the City of Farmington, New Mexico, where we are constructing two 3,000 kw steam turbine generators and for the City of Key West we are planning a 16,500 kw steam generating unit.

Q. I believe you stated that your work includes municipality owned utilities?

A. That is correct.

Q. Mr. Reuss, do you know of any examples where a utility could, operating in an urban area supplying retail power, use the method of primary metering and deduct from the primary central

(Testimony of Willard H. Reuss.)

meter all tenants consumption to determine the rate to a [344] particular consumer for multiple point delivery?

Mr. Reischling: I object to that.

Mr. Cottis: I object, your Honor, unless counsel bring the question within the scope of the Anchorage situation, namely, a similar published tariff and a similar lack of rules, regulations and ordinances, otherwise it is immaterial.

The Court: Well, I think that there is a good deal of merit to that objection except that where his experience would not encompass any such situation as that and it is highly improper he may answer the question although the weight of the testimony will be affected by, of course, the lack of similarity in these conditions and circumstances. You may answer the question.

A. Well, the answer would still be no.

Mr. Rader: Mr. Reuss, with the court's permission, and I guess it takes the court's permission, instead of building a hypothetical question of considerable length, I would request permission—Mr. Reuss has heard all of the testimony in this trial—and I would request that with the physical circumstances as have been described here and which are not in dispute and which the parties have stipulated to, if on that basis, he can testify as to the Anchorage situation?

Mr. Reischling: Of course, if the court please, I object to any such type of dissertation on the part of this witness. A hypothetical question must

(Testimony of Willard H. Reuss.)

embrace all of the elements of all of the evidence that has been introduced, together with the [345] conclusion of anyone else who has theretofore testified before this specific question can be asked this man, and, of course, the record would be silent. No one would know what was in the mind of this witness and it is obviously inadmissible.

The Court: I don't know why it is inadmissible. That is one well known way of getting the opinion of an expert, either by way of a hypothetical question or on the basis of the testimony that he has heard. The objection is overruled.

Q. (By Mr. Rader): Mr. Reuss, you have been in constant attendance and have heard all the testimony in this case, have you not? A. I have.

Q. Considering the physical situation as exists in the Panoramic View and Richardson Vista projects and its service by the City of Anchorage, the policy of tenant metering, do you know of any similar situation in the states where primary metering is used, all the power goes through one meter and the individual tenants' meters are combined and subtracted from the over-all reading to give a rate to the house consumer? A. I know of none.

Q. Do you know whether or not it is done?

A. Well, not in exactly the same case. Would you make yourself a little more clear on that? You mean in respect to retail rates?

Q. Retail rates. [346]

A. In respect to retail rates, no. However, in respect to where there is interchange of energy

(Testimony of Willard H. Reuss.)

between utilities that policy is sometimes followed, that is, where there is wholesale rates.

Q. It could be done? A. Yes.

Q. It wouldn't be difficult as far as the physical application?

A. It wouldn't be difficult for it to be done.

Q. Physically? A. No.

Q. Mr. Reuss, are you familiar with situations, or would you say it is a common practice in the states under a situation as exists locally with the Panoramic View and Richardson Vista corporations to bill and meter precisely as the City has done in this case?

Mr. Reischling: I object to that, if the court please. The question does not show precisely what has been done. In any event, it is immaterial, irrelevant and the City has not plead any practice or custom based upon the same situation existing here in any other state. I am merely making this objection for the record and I will ask at this time that the record show that I may have a continuing objection to all of this line of testimony.

The Court: I think you have already stated that you want to have an objection recorded to all this testimony. The objection is overruled. [347]

Q. (By Mr. Rader): Let me rephrase my question just a little bit. Mr. Reuss. Would you say it was customary or not for a city to meter and bill as the City of Anchorage is metering and billing Panoramic View and Richardson Vista?

A. It is not only customary but I would recor -

(Testimony of Willard H. Reuss.)

mend it to any clients of mine to do it just exactly like the City of Anchorage had done.

Q. Your testimony is not that there are not exceptions to that rule where the people do not take exceptions to it?

A. There are exceptions to it.

Q. The practice of conjunctive billing or combined billing where separate meters are read and combined for purposes of giving a lower rate, you are generally familiar with that practice?

A. I am.

Q. In your experience and in your opinion is that a desirable practice?

A. That is not a desirable practice.

Q. Would you tell us why?

A. Well, one reason why is you get into difficulties trying to determine what your average costs are. You get into difficulties trying to determine where the responsibilities between your point of delivery and the facilities that are between the point of delivery and where the rest of your system starts. I think the parties in this case—well, as an example, in [348] this case how would you allocate your cost for the distribution facilities that you have between your tenants and your customers? You have to take all costs into consideration.

Q. Well, Mr. Reuss, to be uniform in the practice of conjunctive billing would you or would you not have to apply the—well, strike that—Mr. Reuss, what is the practice generally called in rate making

(Testimony of Willard H. Reuss.)

where you take and consider the additional out-of-pocket cost to serve a particular client?

A. That is known as incremental cost.

The Court: Will you explain what that is again?

A. Well, that is where you just consider—let me give you an example, which was pointed out in the previous testimony, where the meter reader only takes 30 seconds to read the meter. That is an incremental cost. Whereas, it takes time for him to get to that place and you would take all the meters he reads in a day, that would be average costs.

Q. Would you carry that example a little bit further and apply incremental cost to the service through the distribution facilities of a particular customer?

A. What do you mean by service?

Q. Well, for instance, its supplying the power through the distribution facilities?

A. Well, another example of incremental cost, you might take a power plant as a good example. As in the steam plant as you load that steam plant up your cost per kilowatt hour becomes [349] less. If we assume that we add a customer to that load the incremental cost would—the additional cost you would be put to by adding that customer would be very slight, but when you analyze your power plant cost you determine your average cost and not your incremental cost. Does that answer your question?

Q. That would apply also to distribution lines?

A. That is right.

Q. In the present case on Government Hill your

(Testimony of Willard H. Reuss.)

incremental cost would be very, very small so far as power lines are concerned, those existing to serve Richardson Vista and Panoramic View, the house meters? A. That is correct.

Q. I want to ask you now generally what your experience is as to the practice of predicating rates for an individual consumer for electricity supplied in an urban area, retail power, as to using incremental cost instead of average cost?

A. Generally you apply your average cost to your rates to see how you are coming out. In other words, you take all your costs into consideration, your investment in your whole system, your operating and maintenance expenses in your whole system.

Q. Are there exceptions to that?

A. There are.

Q. Would you say that was the general practice in rate making [350] under the circumstances described?

A. I could do better if you would let me give an example of where it is used.

Q. Go ahead.

A. In this mid-state project we have reversible turbines which can be used either to generate or pump water. We are entering into a rate negotiation with the Nebraska Public Power System whereby we can purchase incremental power at the cost of incremental fuel from the Nebraska System to raise that water during the night period when the load is low, pump the water back and produce what is

(Testimony of Willard H. Reuss.)

called O.P. Power. There they are getting an incremental rate because it is of advantage to both parties.

The Court: What do you call that kind of power?

A. Off-peak power. That is during the night when the load is low usually.

Q. What is your experience as to the use of primary metering in those instances where, let's assume that the tenants in a housing project received a flat rate, electrical rate, that would be so much per apartment unit. As I understand it now, assuming——

A. That has been done, primary metering, where the distribution facilities are owned by the customer.

Q. And generally when they have a flat rate?

A. Well, by flat rate you mean where the cost of electricity is [351] included in the rental fee?

Q. Yes. A. Yes.

Q. Now, assuming that situation. From your experience what are the problems to that practice which make it undesirable?

A. From a utility viewpoint what usually happens is the operation of maintenance of those facilities usually becomes the responsibility of the utility, that is, the customer asks the utility to operate and maintain those properties. If we have a transformer outage the utility is requested to replace that at cost. Another objection to that is, from the customer's viewpoint if you have a storm or dam-

(Testimony of Willard H. Reuss.)

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(Testimony of Willard H. Reuss.)

age is done to the facilities the utility usually takes care their customers, that is, their customers up to the metering point. They usually take care of repairing and maintaining those first so that you get a dissatisfied group of customers. That is always an unhappy situation.

Q. How about the divided responsibility for the lines?

A. Well, there is a question of law as to that which I am not qualified to testify on, but as to where utility operations stop and start it usually becomes a problem.

Q. Generally speaking that is a matter of policy with the utility company?

A. That is correct. It is a matter of policy.

Q. Now, that is usually determined by negotiations, lawsuits or [352] how?

A. By negotiations.

Q. Mr. Reuss, in your opinion what would be the effect on a rate structure of a change from individual metering and billing as practiced by the City of Anchorage to conjunctive billing or that situation where you combine readings to determine the lowest rate?

A. You would have to take your rate schedule and reanalyze it to see how the costs were divided.

Q. Would you carry that a little bit further, explain that?

A. Well, first of all when you make a rate study you determine what the policy of the particular utility is and use that as a basis for determining

(Testimony of Willard H. Reuss.)

what sort of blocks you desire to make in your rate structure. If you change your policy then you would have to change your rate. It might mean reallocation of costs and raising rates in one particular group and adjusting them in the other. I can't tell without making a study as to just exactly what the effect would be, but it would change your rate structure.

Q. Perhaps we covered this but to make sure, in your experience and in your opinion would the practice of the City of Anchorage in their billing and metering of Panoramic View and Richardson Vista be an approved practice in the states and approved by the various regulatory commissions which would pass on the same? [353]

A. Yes.

Mr. Rader: I believe that is all.

Cross-Examination

By Mr. Reischling:

Q. Mr. Reuss, do I understand your testimony correctly that the cost of serving, that is, the present additional cost of serving the halls in Panoramic View as the buildings are now wired is negligible as compared to the cost of bringing the entire output of power to the place, that is, there are 22 meters in the building for the apartment users and there is one meter that measures the power that is consumed by the halls?

A. That is true and that is also true to any customer that is added.

(Testimony of Willard H. Reuss.)

Q. There would not be any needed addition to the line distribution facilities themselves to serve this additional hall customer than you already have or than would have been required if the hall customer was not furnished? A. That is correct.

Q. Now, do I understand, Mr. Reuss, that you have experted, we will say, municipalities in your engineering capacity?

A. What was that? [354]

Q. Experted was the word I used. That is, did you analyze their rate schedules and help them in fixing rates and so forth? A. That is correct.

Q. What other municipalities have you worked on other than Anchorage?

A. Oh, principally Key West, Florida, and the City of LaFayette.

Q. Key West, Florida, when did you work in that particular city?

A. Well, it has been continuous. I go down there about 4 or 5 times a year.

Q. Is that in connection with their rate schedules?

A. Well, it is in various capacities. It isn't all rates that I go down there on.

Q. Have you actually worked in a rate hearing in the City of Key West, Florida, at which time the rates were fixed which were to be charged the consumer?

A. It wasn't necessary for a rate hearing.

Q. Is your answer to that yes or no?

A. Well, the way you pose the question the answer is no.

(Testimony of Willard H. Reuss.)

Q. Have you engaged in any rate hearing involving the rates of this other city that you say you worked in? What was the name of that?

A. LaFayette. The conditions are the same as at Key West.

Q. In other words, you have not participated in any rate study, fixing the rates for the City of LaFayette?

A. No hearing. [355]

Q. Then if there was no hearing there was no particular analysis, isn't that correct?

A. That is incorrect.

Q. It isn't correct. Rates were, however, fixed there?

A. That is correct.

Q. During the time that you were there?

A. That is correct.

Q. Were they fixed pursuant to ordinance?

A. Well, the rates were analyzed and the ordinance adopted from our analysis.

Q. Doesn't the ordinance there require that there be a public hearing before rates are fixed?

A. I don't believe so.

Q. You don't think so. Now, Mr. Reuss, when you go to a city like Key West, Florida, or LaFayette or Anchorage how do you determine the practice and policy of the city with respect to the furnishing of utilities for the residents of that city?

A. Well, usually I contact the manager and go over their rate policy to see what it is and——

Q. The manager?

A. That is right.

Q. In other words, you discuss it with the manager and he tells you what his policy is, is that cor-

(Testimony of Willard H. Reuss.)

rect? A. That is correct.

Q. And whatever he tells you his policy is that is the policy of [356] the city, is that correct?

A. It usually is.

Q. Do you know how municipalities are operated, Mr. Reuss, ordinarily?

A. In what respect?

Q. Well, under what powers—where do they get their powers and so forth?

A. Well, it is my understanding they get the powers from the City council and it varies from municipality to municipality.

Q. Isn't it a fact, Mr. Reuss, that you know that the policies of a city are determined by the ordinances of the city? A. Well, not necessarily.

Q. What——

A. Let me—can I clarify myself?

Q. Well, if you can.

A. On the rate ordinance at Key West we analyzed the rates and recommended certain rate structures from which the ordinance was set up.

Q. In other words, you go behind the ordinance, is that correct? A. You may state it that way.

Q. Now when you come to a city like the City of Anchorage and you find there is no ordinance at all then you take the position that is declared to be the position of the City by the City Manager?

A. Manager or operating personnel. [357]

Q. And if the city manager changes 4 times a year the policy changes 4 times in a year depending upon every whim of the particular city man-

(Testimony of Willard H. Reuss.)

ager? A. It might.

Q. And the published rates then so far as concerned have absolutely nothing whatsoever to do with the duty of the municipality to furnish power to the consumer? A. Would you repeat that?

(Whereupon, the last question was read by the Reporter.)

Mr. Rader: If it please the court, I object. He is asking him now and has been asking him about legal matters actually as to where the powers come from and what the city manager can do and that type of thing which he is not an expert lawyer and not an expert probably on published rates or the effect of published rates or anything else. He is a rate analyst and it is going a lot beyond the direct examination. He is an engineer.

The Court: Will you read that last question to me?

(Whereupon, the question Line 5 above was read by the Reporter.)

Q. Or the rate or cost to the consumer of the power to be furnished by the City?

The Court: I think you better rephrase your question. It is getting to be somewhat unintelligible now principally because, I think, it is broken up.

Q. Then I will rephrase it. Then so far, Mr. Reuss, as I [358] understand your testimony the rates and regulations as published by a municipality for the furnishing by that municipality of utility

(Testimony of Willard H. Reuss.)

service to the consumer are not binding upon the utility in any manner whatsoever?

A. I wouldn't say so.

Q. Well, how would they be binding?

A. What I mean to say is that your rates are indirectly based on policy. I mean, you can't separate one from the other.

Q. Now, in this particular instance——

The Court: When you say "this particular instance" you mean the City of Anchorage?

Q. The City of Anchorage—with reference to Exhibit D. Will you look at Exhibit D and tell me if you have seen it before, if you are familiar with it?

A. Yes, I have seen it.

Q. Now, do you, after knowing—I mean, notwithstanding their published schedule—go to the City Manager and ask him what his policy is with reference to rates?

A. Would you ask that again?

Q. Do you, notwithstanding the fact that, we will say, know of the published schedule of April, 1953, notwithstanding that fact go to the City Manager and ask him if his policy is different from that published schedule?

Mr. Rader: I object unless counsel wants to state what Mr. Reuss would be doing looking at the rates. Now if the City [359] Manager called him in and said "We want a rate analysis" that might be one thing. I don't know. There could be a lot of reasons why he would go to the City Manager.

(Testimony of Willard H. Reuss.)

Mr. Reischling: I will withdraw that question and I will ask you this——

Q. Which do you follow the policy and practice as outlined to you by a city manager or the published rate schedule?

The Court: But in doing what?

Q. In making your analysis then, we will say, or determining the practice and policy of the city?

A. We do both.

Q. You do both, but the practice and policy as declared by the City Manager has more weight than the published rules and regulations determining the policy, is that not so?

A. They——

Mr. Rader: He is asking for a legal conclusion which this man is not qualified to speak on. It is for your Honor to decide things of that nature.

The Court: I think the question also assumes that the policy and the rate schedule is incompatible and I think that that is a rather unwarranted assumption here.

Mr. Reischling: I think, if the court please, that it was testified to by the witness as the record will show.

The Court: I don't know of any such testimony and if there was there wasn't any testimony here that this witness [360] participated in anything of that kind.

Q. Mr. Reuss, as a matter of fact you have been retained by the City of Anchorage to analyze its rates, have you not?

A. Our firm has.

(Testimony of Willard H. Reuss.)

Q. And how long have you been engaged in that work? A. I don't know exactly.

Q. When did you start?

A. Well, I mean I wasn't the one that made that rate analysis.

Q. When was the rate analysis made?

A. I believe about 1952.

Q. And how many times since 1952 have you been up here? A. This is the first time.

Q. Do you know how frequently any other member of your firm has been here since 1952?

A. I do not.

Q. Have they been here at least annually?

A. I couldn't say because I don't know.

Q. Is your firm on an annual retainer from the City of Anchorage? A. No.

Q. Are you here in connection with a rate study or in connection with this case alone?

A. I was asked to come here in connection with this case.

Q. Did you read before you came the analysis of your rate experts of the rates and regulations of the City of Anchorage?

A. I have read some of it, yes. [361]

Q. Do you have it with you? A. No.

Q. How much of it did you read?

A. Oh, I read through the recommendations and how the study was made.

Q. Is it a printed study? A. Yes.

Q. And how long have you been in Anchorage prior to this trial?

(Testimony of Willard H. Reuss.)

A. Oh, I came here, let's see, when was it—Wednesday or Thursday of last week, I believe, just prior to the trial.

Q. And since you have arrived you have talked with Mr. Rader a number of times? A. Yes.

Q. And Mr. Shannon? A. That is correct.

Q. And where was it that you read the report of your analyst on the rates?

A. I believe in Mr. Rader's office.

Q. In Mr. Rader's office. How much time did you spend on that?

A. I'd say about an hour or two.

Mr. Reischling: That is all. [362]

Cross-Examination

By Mr. Cottis:

Q. Mr. Reuss, the various changes in published rate schedules as shown by Exhibits C, D, E, F, and G are they the result of the rate analysis made by Beck and Associates?

A. I believe some of them are. I don't know just how many, but I believe some of them are. There has been some modification even after our recommendations, but I don't know just what they are without going through and studying them.

Q. On your 1952 study of the matter do you know what the return on its invested capital the City was making on its then current rates?

Mr. Rader: If it please the court, I object to that testimony. The only thing this expert witness has testified to is to general rate making policy in

(Testimony of Willard H. Reuss.)

the United States. If we are going to go into the return of the City of Anchorage then we are going to drag this trial out for about 3 or 4 days. The return of the City of Anchorage—there has never been a claim on that so far and it is not in the pleadings. It is improper and I don't think it has any place in the record or anything to do with this witness' testimony.

The Court: The objection is sustained.

Mr. Reischling: May I say, if the court please, counsel opened that phase of it up. It is proper cross-examination.

Mr. Rader: I don't know where I ever opened anything about the return to the City of Anchorage. I asked this man if [363] it is a general policy to have conjunctive billing, combined metering and that type of thing in the states. At least that is so far as I am aware of the extent of his testimony.

The Court: The objection is sustained.

Q. (By Mr. Cottis): What is meant by the term conjunctive billing?

A. Well, I will try and recall what the definition is in the F.P.C. Report. It is where combined energy or demand is read by two or more meters and billed as though it were one meter. That definition is in the National Rate Book if you care to look it up.

Q. If it is more convenient and practicable for the utility supplier to use more than one meter to serve a consumer who is entitled to one point

(Testimony of Willard H. Reuss.)

service would you then call such an arrangement conjunctive billing?

A. Would you repeat that question again?

Q. If for the convenience of the utility company it is more practicable to use more than one meter in order to serve a consumer who is entitled to one point service would that come within the definition of conjunctive billing?

A. You have more than one point of service?

Q. Yes.

A. That would be conjunctive billing.

Q. Now, we are assuming that the consumer is entitled to one point service, but that is because of topographic, geographic [364] or some other element for the convenience of the utility company, separate meters are installed and combined reading given. Is that conjunctive billing?

A. You mean where you have one point of delivery?

Q. No. Physically set up it is more than one point of delivery but the additional points of delivery are there for the convenience of the utility company.

A. Like out at this particular instance?

Q. Yes. A. That is conjunctive billing.

Q. Well, are you assuming, as I asked you to, that it is set up for the convenience of the City, the arrangement?

A. I believe under this case it would be determined conjunctive billing.

(Testimony of Willard H. Reuss.)

Q. Have you been out and examined these installations?

A. Yes, I have seen I think one or two. Was it two that we saw?

Mr. Rader: I believe it was.

A. I think I saw two and I don't remember which housing unit it was in.

Q. Now do you know of instances where the utility supplier uses separate meters for its own convenience entirely?

A. And combines the billing?

Q. Yes. A. Yes.

Q. What sort of instances are there that you are aware of? [365]

A. Well, I can think of one instance where you have single phase and 3-phase power and where the rate schedule is such for the light and power that they add the two readings there to make one reading.

Q. Are there instances of a large factory building, for example, with more than one entrance?

A. I believe that might be correct.

Q. Actually the National Electrical Code envisions such things, does it not?

A. Where you have a large load and under one roof that is sometimes done—split that load up.

Q. Now what difference does it make whether it is under one roof or not?

A. I don't know what difference it makes. I don't know what you are leading to. What difference in what respect?

(Testimony of Willard H. Reuss.)

Q. Well, from the point of view of furnishing electrical energy and ignoring completely the matter of metering that energy does it make any difference whether there are two service drops to a single building or a separate service drop to each of two buildings that are separated by a space of 5 feet? From the point of view of the supplier in considering only the delivery of energy it makes no difference, does it, whether a roof covers that intervening 5 feet or not?

A. Well, from the standpoint of service it makes no difference, no. [366]

Q. If you assume, as testified by Mrs. Hall, that each of these projects would be treated as one consumer and that friendly relations existed between the City and these project owners is it not true that the present arrangement of electrical connections is a simple and practicable arrangement?

A. I think it is evident by the way it has already been done, yes, it is a simple way to do the electrical arrangement.

Q. And it would be a practicable way of effectuating the intent of the parties if the intent of the parties was that the house consumption would be treated as one consumer?

A. I think under that assumption you would certainly have to go into the terms and conditions of the contract you would be entering into.

Q. Well, assuming, as I say, an agreement or contract between the parties that the project owner would be entitled to having house current treated

(Testimony of Willard H. Reuss.)

as one consumption, is there any more economical or practical or feasible way of arranging the delivery of energy than it now is?

A. Physically no.

Mr. Rader: I think we stipulated, if it please the court, that this was the most economical and most practicable way to supply these premises with electrical energy.

The Court: Well, I thought there was some such stipulation too, but I am not positive about it.

Mr. Rader: I believe that there was. [367]

Mr. Cottis: Well, I am perfectly happy to have you stipulate. I am not sure there was. Anyhow, it is now stipulated, is that right?

Mr. Rader: Well, perhaps you better go on with the witness. It was my recollection that it was stipulated but that question has been answered so it is not necessary to go on with that.

Q. (By Mr. Cottis): In other words, Mr. Reuss, the simple addition of meter readings under such an arrangement is merely a division of—to accomplish the intent of the agreement and does technically represent conjunctive billing, does it?

A. I wouldn't say so.

Q. I am not sure that I understand your answer.

A. The answer is that it is conjunctive billing.

Q. Maybe——

A. Maybe I didn't get your question.

Q. Let me put it this way: We are assuming an agreement between the consumer and the supplier under which the consumer is entitled to be treated

(Testimony of Willard H. Reuss.)

as one customer. For the purposes of paying for its house current we are assuming that the most practicable, economical, feasible way of delivering the power is the way it has been done on Government Hill with a separate service drop to each building. Now, with those assumptions would the combining of meter readings still fall [368] within your definition of conjunctive billing?

A. I would say so by definition.

The Court: I think we will recess at this time for 5 minutes.

(Whereupon, at 11:10 o'clock a.m., following a 5-minute recess, court reconvenes and the following proceedings were had.)

Q. (By Mr. Cottis): If the separate meters were installed for the convenience of the utility company, the City in this case, does it still not represent an effective method of giving the benefits of single-point service?

A. I don't quite understand what you are driving at there.

Q. Normally the City's facilities end at the meter base, do they not? A. That is correct.

Q. And with single point delivery of energy the consumer would either maintain or make arrangements to maintain the facilities on his side of that single point of entry, is that correct?

A. That is correct.

Q. Now, the consumer would get the benefit of applying the sliding scale to the total house con-

(Testimony of Willard H. Reuss.)

sumption, would he not? A. That is correct.

Q. Now, if, for the convenience of the City, instead of making a physical single point of entry several points of entry are [369] made and several meters are installed, that is still, is it not, a practicable way of giving him the benefits that he would have realized from a single point of entry?

A. Pose that question again.

Q. By combining——

The Court: It seems to me that the court itself is able to draw that inference. It is just a matter of billing, isn't it?

Mr. Cottis: Yes, your Honor.

The Court: That is one method of billing which can be done just as well as others with that kind of installation?

Mr. Cottis: Yes, your Honor. I will not press that question.

Q. (By Mr. Cottis): If these establishments had been your client's in the original stages of this matter, that is, before construction was too far along, what would your advice have been in order to enable your clients to obtain the most favorable rate?

A. Well, in order to determine that I would have went to the utility to find out what their policy was first. Then from determining what their policy was I may have been able to do it one or two different ways. It all depends on what their policy is.

Q. Now suppose that you did go to the utility and was informed that until August of 1949 we had

(Testimony of Willard H. Reuss.)

a policy against combining meter readings but we repealed that policy formally and the [370] door now is wide open. Then what would your recommendations have been?

A. Then your only alternative would have been to have provided all the facilities in that area and had primary metering at one point of delivery, if the policy was so that you could do that.

Q. You mean there would have been no alternative of making arrangements for combining these separate meter readings?

A. That is correct. There would not have been any alternative.

Q. Why?

A. Well, if their policy says that you can't combine your meter readings then——

Q. I either misspoke or you misunderstood me. You go to the utility company and you say, "What is your policy?" Their answer is, "We don't have any policy against combining meter readings. True, we had such a policy and it was expressed in the ordinance 55 until 2 months ago or some such time and at that time we repealed that ordinance so today we have no policy at all——"

Mr. Rader: If it please the court, it seems to me like that question is a combination of a question, argument and final summary of counsel's case, or something. I don't know how this witness can answer that kind of question.

The Court: It seems to me that the form of the question assumes the non-existence of policy merely

(Testimony of Willard H. Reuss.)

because the [371] ordinance had been repealed apparently without the knowledge of those concerned in these matters, but as I see it the existence of a policy does not depend on the co-existence of an ordinance.

Mr. Cottis: If the court please, I don't know about the repeal of the ordinance without the knowledge of those concerned because it was certainly done formally by the council and the mayor and so on, on the existence of a policy where the City Manager is empowered to make rules and regulations and doesn't. So where this ordinance, that does purport to set forth some very definite legislative intent, that is repealed I would think that the inference, if anything, was that we repealed that prohibition against combined meters so as to open the door and permit it in appropriate cases.

The Court: Of course, that argument could be made but the point I am making is that I think it is a mistake to assume that because an ordinance has been repealed that there is no policy. And, of course, the fact that that ordinance was assigned as a basis for the action certainly seems to be pretty conclusive proof that those concerned in these matters were acting in the belief that the ordinance was still in existence. So it seems to me that the question as formed assumes two things, (1) that those concerned in these matters knew that the ordinance had been repealed and, of course, legally they would be chargeable with knowledge, but we are down to actual knowledge now, and the other is a policy

(Testimony of Willard H. Reuss.)

could not exist in the absence of the ordinance [372] itself. I think both of those are assumptions that are contrary to the—one is contrary to the evidence and the other one seems to me does not necessarily follow——

Mr. Cottis: I can't agree that it is contrary to the evidence, your Honor, because——

The Court: Well, it is contrary to the evidence until, you might say, it was shown that the ordinance had been repealed and that only took place yesterday, but all the evidence and the acts of the City with reference to these matters I think it is clearly shown to have been in the belief that the ordinance existed and that belief persisted until it was shown to the contrary here yesterday.

Mr. Cottis: I certainly don't think that we can presume the City was ignorant of the repeal of that ordinance in November of 1951 at which time they turned down the request of the plaintiffs.

The Court: But I am not speaking of the City. Undoubtedly that is true. I am speaking of those who were concerned in these matters that have been made the subject of testimony here. Now obviously they didn't know of it then. All of the testimony points to that fact. The City council might have done it, I don't know whether the City council did or not, but so far as actual knowledge is concerned I think that the testimony all negatives knowledge on the part of those concerned with these matters involved in this controversy.

Mr. Cottis: By the phrase "those concerned"

(Testimony of Willard H. Reuss.)

does [373] your Honor refer to Mr. Rader alone?

The Court: No. No, I am referring to those who were responsible for, you might say, executing it or giving effect to the rate schedules so far as billing is concerned.

Mr. Cottis: That is employees of the City, your Honor.

The Court: Employees and officials of the City—those charged with the responsibility for administering—

Mr. Cottis: I follow you now.

Q. (By Mr. Cottis): Mr. Reuss, our memories are all fallible on these matters but if you will assume that I am correct in recalling that Mrs. Hall testimony that the policy of the City as outlined by the City Manager in the years 1950 and '51 and thereabouts would permit combined meter readings on these two establishments, is there any reason that you know of why that policy shouldn't have been followed? A. None.

Q. You spoke on direct examination of some difficulty possibly in allocating costs between the tenants and the house. What in your opinion would be the proper method of making such an allocation?

A. Between the tenants and the house service?

Q. Yes.

A. The proper method would be to take all your costs into consideration and arrive at an [374] average.

Q. But then consider the situation where you have 22 tenants on a domestic rate and the house on

(Testimony of Willard H. Reuss.)

the commercial rate, in making an allocation between those two classes of consumers would you make that allocation on the number of kilowatt hours of energy consumed or on the amount of billing, the amount of money actually paid to the utility company on the nature of the loads the demand required what would be the reasonable basis in your opinion of allocation?

A. You have to take all of those components that you named into consideration.

Q. From an engineering point of view it would be perfectly possible to do it, would it not?

A. Oh, yes.

Q. You stated on direct examination, I believe, that to find accurately the effect of combined billings here the rate schedule would have to be reanalyzed. Is my recollection right?

A. Not only rate schedule, but rate schedules—all of them.

Q. Is the reason for the importance of such matters normally the slender margin of profit, or return if you prefer the word, which a utility company gets on its invested dollar?

Mr. Rader: If it please the court, I want to make the same objection to that question as I made previously and, that is, that counselor is attempting now to go into the return from the utility operation over the past, I would say, some 5 or 6 years [375] and then we are going to get into an awful lot of problems on valuation and propriety of return. the

(Testimony of Willard H. Reuss.)

amount of return, and I would also assume we would have to produce evidence relative to the conditions at that time in Anchorage, the growth of Anchorage and the fact that part of our utility system with Anchorage Public Utilities Commission is operated by them. I think we will get into a fantastic field if we start going into return with the utilities. This case is not a case where they alleged return nor is there any evidence as to return.

The Court: I don't think the question is susceptible of that interpretation, but I think that it ought to include the element of uniformity; not only marginal return but the element of uniformity would be something that would necessitate this wholesale revision.

Mr. Cottis: Your Honor, I left out uniformity. I don't think it is applicable where you have only these two establishments that are coming into existence and no comparable establishments.

The Court: That doesn't preclude the element of uniformity. After all, it seems to me that the uniformity would not only comprehend matters in the usual sense, but relative or comparative. For instance, it could be said that certain rates are uniform in the sense that there is no great disparity between them considering everything that would enter into this determination and so it seems to me that where that degree of uniformity or that uniformity [376] in that sense would be disturbed it should be taken into consideration just as well as the fact that the returns on the investment might be marginal and

(Testimony of Willard H. Reuss.)

would necessitate a wholesale revision of the schedule.

Mr. Cottis: In other words, the element of uniformity to which you refer would be the relationship between different classes of rates?

The Court: Yes. You might refer to it as a desire to avoid too great a disparity between the two schedules, the different consumers.

Mr. Cottis: I follow you.

Q. (By Mr. Cottis): Mr. Reuss, is it partly the undesirability of disparity in a different rate schedule and partly the marginal return on profit which a public utility makes that would have required a rate reanalysis?

A. I believe the answer is correct, yes. You would have to analyze it to see if you still were remaining whole on the situation.

Q. Now, if it should happen somehow that the utility company was making, say, 100 per cent on its invested dollar would there then be any need for a rate reanalysis?

Mr. Rader: If it please the court, the same objection. We are getting into another question here which is going to lead us far afield. [377]

The Court: I am not going to permit you to go into the return here on the investment, but this question I think doesn't have any tendency to do that and it is a good deal similar to the one previously asked. I think it is a proper question.

Mr. Rader: If it please the court, I want to make another objection on the basis there is no such fact

(Testimony of Willard H. Reuss.)

in evidence and he is asking for a hypothetical answer. It is not based on anything in this case and there is no fact in here which would give him the right to make an assumption of 100 per cent return or any other return. There is no evidence in the case as to return.

The Court: Well, but it is proper cross-examination on the testimony given by the witness that in case of a certain change it would require a revision of the rate schedules and so he could ask the witness, "Well, why would such a revision be required," but he has elected to proceed by putting his questions in another form. There is nothing objectionable about the question in that form. It is just a matter in which he has a choice. You may answer the question.

A. If the City still desired to make a 100 per cent return on their investment then you would have to revise the rates. If 90 per cent was acceptable to them then you wouldn't.

Q. In other words, it would, from that aspect of the matter, be analogous to giving a wage rate to the employees of its electrical department, is that right? A. I don't believe it is analogous. [378]

Q. You are talking about the mere fact its revenues would be reduced somewhat beyond what they are, is that right? A. That is correct.

Q. The same result then would obtain with the expenses increased, is that correct?

(Testimony of Willard H. Reuss.)

A. That is correct.

Q. If the employees of the electrical department were given a wage increase would there be any need for reanalyzing the rate schedule?

A. How much?

Q. 5 per cent? A. Possibly no.

Q. Do you know how long the rate schedule that is expressed in Exhibit C, that is the one that was in effect in 1951—do you know how long that had been in effect prior to that time?

A. No, I don't.

Q. Do you know whether it was more than 5 years, for example?

A. I don't know. I think it was brought out in the testimony but I don't recall what it was.

Q. What is the normal accepted standard of a fair return on the invested dollar in connection with electricity?

Mr. Rader: Objection, your Honor.

The Court: Objection sustained.

Mr. Cottis: Your Honor, I offer to show by [379] this witness that the City of Anchorage in 1949, 1950 and 1951 was demanding and receiving a return on its invested dollar that is far in excess of normal practice.

The Court: But why do you offer that? Now, suppose you proved it. Then what would we do with that proof?

Mr. Cottis: I would offer it for the purpose of showing that it is perfectly reasonable to consider that the City did make the arrangements testified

(Testimony of Willard H. Reuss.)

to by Mrs. Hall on the theory that if I am selling oranges and I am marking them up five hundred per cent I might give you a quantity price on oranges where I would withhold it from another customer. And I would like to put before the court what I believe is a fact that the City was treating electricity just like oranges or any other commodity at that time and that they would make a deal here and deal there. They were being pressed by competition from Chugach Electric and Inlet Power Company and they weren't behaving like a utility company.

Mr. Rader: If it please the court, it gets back to the situation, what if he did prove that the City offered them a special rate? Now, Mr. Cottis has assumed here that there was no prior example. The testimony was yesterday that the Alaska Housing Authority since 1946, long before these establishments came into existence, was built exactly as they are today and exactly as these establishments are built. Now, even if we did offer them a special rate it would have been discriminating against [380] Alaska Housing and with all the other units it would have been a discriminatory rate. So assume such a contract was made or assume the City Manager represented it to them, the only evidence in the case so far is that it might have been done during the summer of 1951 and within two or three months the City council readily dissipated any delusion these people might have had about a special rate.

The Court: I think it is possible to point to all

(Testimony of Willard H. Reuss.)

kinds of dereliction on all parts of the City officials. That seems to be the character of city management, but that doesn't make it proper evidence here. Objection sustained.

Q. (By Mr. Cottis): You are familiar, at least from the testimony in this case, Mr. Reuss, are you not, with the general situation concerning the 14-story apartment buildings, the McKinley and 1200 "L"?

A. I am.

Q. In those installations the owners gain the benefit of low incremental cost from single-point service, do they not?

A. I wouldn't say so.

Q. All right. In what way do they not then?

A. Well, the rates are based on average cost and they are billed the rate. I don't know just what you mean by "benefit of low incremental cost." Do you mean on the schedules of the rates?

Q. In the application of the schedules they get the benefit of [381] applying one scale to their house consumption?

A. That is the way the rate works, yes.

Q. If the plaintiff's housing establishments offered an arrangement to the City which is equivalent to that of the 14-story apartment buildings should not the same benefit of the single application of the rate be made available to the plaintiff's establishments?

A. Are you stating that their establishments have one point of delivery, one building?

Q. Either in actuality or because of something for the City's convenience it is spread out.

(Testimony of Willard H. Reuss.)

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A. Are you stating that their establishments have one point of delivery, one building?

Q. Either in actuality or because of something for the City's convenience it is spread out.

(Testimony of Willard H. Reuss.)

A. You have given me two cases.

Q. All right. Assume they offer one point of entry, a single entrance point—whatever the technical term is—for each establishment——

Mr. Rader: If it please the court, now he is assuming this and the evidence of Mr. Reuss was to the fact that that policy is not good and it is not good to have them maintain their own lines, building their own lines and everything else. Now, he has to assume that the City policy was merely to let a person build utility lines all over the City of Anchorage, if they give the City one point of delivery that the City would give them a certain rate. That is not necessarily true either. There is an awful lot of policy in cases I cited to your Honor yesterday, particularly the telephone company case. You couldn't have [382] everybody running power lines here and there where there is public safety involved, where you have to inspect and so forth. Now, this question assumes that the only policy the City has is single-point delivery and it is an improper assumption. It is not in accordance with the evidence and it is not even a half-way complete question.

The Court: Will you repeat the question?

(Whereupon, the Reporter read Question Line 3 through Line 15, page 382.)

The Court: I don't think the court is interested in this witness' personal opinion as to what the City

(Testimony of Willard H. Reuss.)

should have made or what arrangement the City should have made in this instance.

Q. (By Mr. Cottis): I think before we recessed, Mr. Reuss, we were considering the situation and your conclusions as to what you would have done had you been the engineer or architect for these projects at their inception and I believe it was your testimony that you would first have inquired from the City whether there was any policy against combined or combining meter readings. Is my recollection right?

A. I would inquire as to what their policy was, that is correct.

Q. And if you were informed by the City that "We have no policy against combining meter readings" then what would your advice have been to these plaintiffs?

Mr. Rader: If it please the court, I object. That is [383] assuming again they told Mrs. Hall that they had no policy. The evidence is that they were treating Alaska Housing, which is a comparable establishment, that way and had been since 1946, and before and after these people and everyone else in town has been treated the same way. Now, assuming they had made a special situation it is immaterial.

The Court: Well, I think the question calls for an expert opinion on a non-expert matter. The court is able to draw the inference that in that situation he would have advised his clients of what would be the most advantageous to them. You don't need

(Testimony of Willard H. Reuss.)

this witness to give you an opinion on that. It is a non-expert matter.

Q. (By Mr. Cottis): In your experience, Mr. Reuss, have you come across any other situation similar to this in these respects: a similar published tariff, a complete lack of any control through a public service commission or public utility commission or regulatory body of that nature and a complete lack of any ordinances, rules or regulations beyond what appears in these telephone-book published schedules? Have you come across anything like that?

A. You mean a situation exactly like this? No.

Q. Almost invariably there is some regulation, is there not?

A. Yes. May I qualify that statement?

Q. Certainly. [384]

A. Either by regulatory commission or by City council or local rule.

Mr. Cottis: I have no further questions.

Redirect Examination

By Mr. Rader:

Q. Mr. Reuss, what percentage of the power consumed in the state of Nebraska, the rates for that power is analyzed by you or under your supervision in your office?

Mr. Cottis: That has no bearing on the cross-examination, your Honor.

Mr. Rader: If it please the court, on cross-examination Mr. Reischling brought out the fact

(Testimony of Willard H. Reuss.)

that there were several individual municipalities for which Mr. Reuss himself made studies for and I intend to show that 90 per cent, in fact the complete state of Nebraska, except for Omaha, are a client of Mr. Reuss and that the analysis for all of their rates is done by him or persons under his supervision.

The Court: Well, it would appear to be within the scope of that particular cross-examination so the objection is overruled.

A. Are you talking about retail power?

Q. Retail power.

A. I would say approximately 50 per cent, something on that order. [385]

Q. 50 per cent?

A. There are two principal public power districts that retail electricity—Consumers Public Power District who is our client and they serve all except the Omaha area and I'd say that their retail sales is about the same as Omaha so it would be approximately 50 per cent.

Q. You are rate analyst for that area?

A. That is correct.

Mr. Rader: No further questions.

Mr. Reischling: No questions.

(Thereupon, the witness was excused and left the stand.)

The Court: We will recess to 1:30. I suppose that Mr. Davis is here again to inquire as to when we are going to conclude this case.

Mr. Rader: If it please the court, I may have two more witnesses, I am not certain. I don't think they will take very long. I would imagine a half hour or an hour would completely wind up the case.

The Court: We will resume at 1:30.

(Whereupon, at 11:55 o'clock a.m., the court continues the cause to 1:30 p.m. of the same day.)

(At 1:30 o'clock p.m., all counsel being present, the trial of said cause was resumed.)

Mr. Rader: If it please the court, during the noon [386] recess counsel for all the parties stipulated and I believe we are at this time prepared to stipulate to the following statement of facts——

Mr. Reischling: It isn't a statement of fact. It is a statement of Mr. LaZelle if called would testify as you are going to read.

Mr. Rader: Mason LaZelle if called would testify as follows: That he does not recall ever talking to Mrs. Hall prior to the council meeting of November 9, 1951, relative to combining meter readings to give a different rate, or the National Electrical Code although the subject was discussed with him by Mr. Sharp, the City Manager, the same day as the council meeting. Mr. LaZelle would further testify that possibly an inspector who was his employee discussed the matter with Mrs. Hall previous to that time but that if he did discuss it—if the inspector did discuss it with Mrs. Hall in the ordinary course of his employment he should have

come to Mr. LaZelle with the information and Mr. LaZelle has no distinct recollection of his inspector ever having mentioned it to him. Mr. LaZelle would further testify that he cannot say that the inspector did not discuss the matter with Mrs. Hall or himself. He would testify that he did have conversations with Mrs. Hall relative to routine operations of the projects, both prior and after the council meeting referred to.

I would like to read into the record, in case it hasn't [387] already been read, Section 608.1 of the Anchorage General Code dated April 12, 1950.

The Court: Well, what is the significance of that date? Is that the date the code became effective?

Mr. Rader: I am trying to identify it, your Honor. The effective date of the code, yes, when it was enacted as a complete code. The section reads as follows: "The City Manager with the approval of the City council may adopt and promulgate such rules and regulations as may be necessary pertaining to the supplying and discontinuance of electric service to all consumers, including but not being limited to rates, charges for connecting and disconnecting service, separate meters, for separate premises, consumer notices to discontinue service, meter tests, etc., and no person shall fail to comply and it shall be unlawful to fail to comply with any such rule or regulation."

With that the City rests.

Mr. Reischling: Counsel, may I ask at this time that it be stipulated for the record that Sections

2301, I believe it is, to 2306 of the National Electrical Safety Code and 2321, I think it is.

Mr. Rader: I believe we stipulated to that.

Mr. Reischling: I was going to say we could have that copied and offered in evidence as an exhibit so we would not need to have the book in and future reference to those particular sections would be made much more simple. With the consent of the [388] court could we do that?

The Court: There is no reason why it can't be done with the consent of the parties, but what do those sections relate to?

Mr. Reischling: If the court please, those are the sections to which testimony has been introduced which the City at one time, or at least the testimony indicates that certain representatives of the City contended that those sections prevented the City from giving combined billing. I believe that is a fair statement.

The Court: But what purpose are these—what is the purpose of this particular matter? What is it going to prove?

Mr. Reischling: Well, if the court please, the City has taken 3 positions. The first position that they took was that those sections of the National Safety Electrical Code prevented them from giving the benefit of combined billing to the plaintiff corporations. The second position that they took was that Ordinance No. 55 specifically prohibited combined billing. Ordinance No. 55 having been repealed prior to that particular date which disposes of that contention. A mere reading of Sections 2301 to 2306

could have no possible bearing upon the problem before the court.

The Court: From your statement of it then I take it the purpose for introducing these sections of the Code is for the purpose of the City making a mistake. [389]

Mr. Reischling: My purpose in asking it go in is to make a record.

The Court: A record of what?

Mr. Reischling: A record of the proceedings of this trial.

The Court: It has to have some bearing on some issue in the case. That is what hasn't been made plain to me—how these sections so far as anything being said here at the moment is concerned it would show nothing except that the City was mistaken. Now, what good is that?

Mr. Reischling: Well, if the court please, this case may go to a higher court.

The Court: I don't care where it goes. I am asking now what bearing it has on this case here?

Mr. Reischling: It has been testified to and I believe it is properly a part of this record.

The Court: What is the testimony now that would make that competent?

Mr. Reischling: Well, I think counsel will agree with me that witnesses did testify that the City took the position——

The Court: I understand that and I have called attention to it, but my question now is what else would they show except to show that the City was mistaken?

Mr. Reischling: What I want to put in is what these particular sections say. [390]

The Court: For what purpose? To show the City make a mistake? What else would it show? Unless it shows something else, why, it will be excluded.

Mr. Reischling: The court will allow an exception to that ruling.

The Court: Is there any rebuttal?

Mr. Reischling: Plaintiff Panoramic View has no rebuttal.

Mr. Cottis: No rebuttal, your Honor.

The Court: Well, I think in view of the fact I have got a lot of other matters I am going to attempt to dispose of before leaving I will have to ask counsel to file briefs. How much time is required?

Mr. Reischling: If the court please, I will have to try a case as soon as I return to Seattle and I would appreciate it if the court would give me three weeks.

The Court: I suppose there is no objection to that, is there?

Mr. Rader: No.

Mr. Cottis: No.

The Court: How much time do you want? Do you want the same amount of time for your answer brief?

Mr. Rader: I don't think it will take that much time, but I request——

The Court: Three weeks will be allowed to the parties and five days for a reply brief if one is necessary. [391]

Mr. Reischling: Thank you, your Honor. 5 days, that would be exclusive of the court's consideration because of the geographical location that confronts me.

The Court: There has never been any difficulty over the computation of time in which briefs have been filed, but if anything of that kind should develop Rule 6 of the Federal Rules of Civil Procedure will govern.

You may adjourn court then I may be able to get at this other case. We will recess to 3:30.

(End of Record.) [392]

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript of the proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on March 18, 24, 25, 28, and 29, 1955, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed March 16, 1956. [393]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE—ORIGINAL
RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to the provisions of Rule 10 (1) of the United States Court of Appeals, Ninth Circuit, the provisions of Rule 75 (g) (o) of the Federal Rules of Civil Procedure, and the Designation of counsel for defendant, I am transmitting herewith the Original Papers and Exhibits in my office dealing with the above-entitled action or proceeding, together with the Court Reporter's Transcript of Testimony taken at the trial of the cause.

The papers and exhibits transmitted herewith are described as follows:

1. Complaint, with exhibits filed January 23, 1952.
2. Answer, with exhibits filed February 13, 1952.
3. Stipulation (permitting supplements to complaint) filed March 1, 1955.
4. Supplemental Complaint filed March 1, 1955.
5. Minute Order entitled Pre-trial Conference filed March 18, 1955.
6. Supplemental Complaint filed March 23, 1955.
7. Stipulation (unsigned by the City of Anchorage) filed March 23, 1955.
8. Notice of Demand to Produce (Documents) filed March 23, 1955.
9. Minute Order Entitled Trial by Court filed March 24, 1955.

10. Minute Order entitled Pre-Trial Conference filed March 24, 1955.

11. Minute Order entitled Pre-Trial Conference filed March 24, 1955.

12. Minute Order entitled Pre-Trial Conference filed March 24, 1955.

13. Minute Order entitled Trial by Court Continued (concerning motion to dismiss by City of Anchorage) filed March 28, 1955.

14. Minute Order entitled Trial by Court Continued (on motion to dismiss and denial of same) filed March 28, 1955.

15. Opinion of the Honorable George W. Folta, deceased, District Judge, filed May 25, 1955.

16. Findings of Fact and Conclusions of Law filed May 27, 1955.

17. Minute Order entitled Hearing on Objections of Findings of Fact and Conclusions of Law and Judgment, filed June 17, 1955.

18. Judgment and Decree filed June 21, 1955.

19. Decree filed June 21, 1955.

20. Motion for New Trial filed June 30, 1955.

21. Order Denying New Trial filed August 31, 1955.

22. Notice of Appeal filed September 7, 1955.

23. Order Granting Extension of Time in Which to Docket and File Record on Appeal, filed October 14, 1955.

24. Order Substituting Attorneys filed December 2, 1955.

25. Full and complete transcript prepared by

Official Court Reporter of all proceedings and evidence in the action.

26. Appellee's exhibits Numbers 1 through 10, inclusive.

27. Appellant's exhibits Numbers A through M, inclusive.

The papers herewith transmittted constitute the record on appeal from the judgment filed and entered in the above-entitled action by the above-entitled court on June 21, 1955, to the United States Court of Appeals at San Francisco, California.

Dated at Anchorage, Alaska, this 28th day of March, 1956.

[Seal] /s/ WM. A. HILTON,
Clerk of the United States District Court, Third
Division, at Anchorage, Alaska.

[Endorsed]: No. 15082. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Corporation, Appellant, vs. Richardson Vista Corporation, and Panoramic View Corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Alaska, Third Division.

Filed March 29, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15082

CITY OF ANCHORAGE, a Municipal Corporation,
Appellant.

vs.

RICHARDSON VISTA CORPORATION, a
Washington Corporation, and PANORAMIC
VIEW CORPORATION, a Washington Corporation,
Appellees.

STATEMENT OF POINTS

The Appellant herein makes the following statement of points:

1. Appellant (defendant) was unlawfully deprived of its right to a trial by jury of all issues so triable.
2. The Judgment, Decree and Opinion of the Court are contrary to the law.
3. The Judgment, Decree and Opinion of the Court are contrary to the evidence.
4. The Judgment, Decree and Opinion of the Court are contrary to the weight of evidence.
5. There is no sufficient or substantial evidence tending to support the Opinion, Judgment and Decree entered herein.

6. The judgment of the Court and the Memorandum Opinion, upon which said judgment is predicated, or either of them, do not find sufficient facts nor contain sufficient conclusions of law.

8. The Decree and Judgment as entered and the Memorandum Opinion are not definite enough to dispose of the issues in controversy between the parties in this cause.

9. The Court erred in denying defendant's motion to direct a verdict in its favor at the close of plaintiffs' case.

10. The Memorandum Opinion and the Decree and Judgment entered thereon are not sufficiently clear and definite to apply the doctrines of estoppel and res judicata to future cases and controversies.

11. The Memorandum Opinion filed by the Honorable George W. Folta, deceased, is not sufficient in findings of fact and conclusions of law to enter a decree on the same.

/s/ LYNN W. KIRKLAND,

Attorney for the Appellant,
City of Anchorage.

HARTLIEB, GROH & RADER,

/s/ By JOHN L. RADER,
Special Counsel.

[Endorsed]: March 22, 1956.

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a Corporation, *Appellant*,

vs.

RICHARDSON VISTA CORPORATION and PANORAMIC VIEW
CORPORATION, *Appellees*.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
OF ALASKA, THIRD DIVISION
HONORABLE GEORGE W. FOLTA, *Judge*

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THE ARGUS PRESS, SEATTLE

FILED

AUG - 3 1956

PAUL P. O'BRIEN, CLERK

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation, *Appellant*,

vs.

RICHARDSON VISTA CORPORATION and PANORAMIC VIEW
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HONORABLE GEORGE W. FOLTA, *Judge*

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United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,

Appellant,

vs.

RICHARDSON VISTA CORPORATION and

PANORAMIC VIEW CORPORATION,

Appellees.

No. 15082

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
OF ALASKA, THIRD DIVISION

HONORABLE GEORGE W. FOLTA, *Judge*

BRIEF OF APPELLEE

FOREWORD

Appellee, Panoramic View Corporation, takes issue with Appellant City's statement of what it designates as the "facts" upon which this case has been brought here for review. It is our concept that the function of a statement of facts is to fairly and briefly set forth accurately the skeletal factual situation shown by the record upon which the trial court based its judgment.

In the trial of the case and just before the close of appellee's case, there was introduced into evidence an ordinance of The City of Anchorage, which had repealed an Ordinance upon which appellant's counsel was relying (Ex. 10, R. 356). Counsel expressed surprise and asked for a recess to check the city's records.

The recess was granted and when court re-convened, counsel for appellant City stated, in part as follows (R. 356-362) :

“MR. RADER: . . . There is no doubt that it (Ord. No. 55, Ex. i) was impliedly repealed by the Code. The question is whether it actually was repealed, *but then that question is no longer, I guess, necessary because of the fact that plaintiffs have produced actually the repealing Ordinance of 1949 which predates the code.* (Emphasis supplied)

THE COURT: But it seems to me it would be impliedly repealed by the enactment of the code.

MR. RADER: It could have been and it may have been. I don't know, but apparently the previous City attorneys and the utility company in operation have not considered it as being repealed.

THE COURT: You mean operating under it?

MR. RADER: They have been operating — some parts of the ordinance have been repealed and changed. Some of the procedure has been changed by subsequently enacted ordinances and matters which are contained in the agreed code and the amendment to the agreed code by the council to date since 1950, but the important (319) sections of Section 55 are those which were repealed and nothing was replaced. In other words, it was apparently repealed in 1949 during the time Mr. Hellenthal was City attorney and nothing was enacted to replace it. *I suppose that it puts the utility company in a situation as having operated completely without any ordinance as to the matters in essential dispute in this action.* However, I am not certain that what I am saying has too much bearing on the question because I am prepared still to argue my mo-

tion to dismiss on the evidence presented thus far as to discrimination. (Emphasis supplied)

THE COURT: I don't know yet—nobody has apprised me what it is that Ordinance 55 provides for.

MR. RADER: Ordinance 55, if it please the court, Section 22, '*Supply to separate premises through separate meters. In no event will separate premises, even though owned by the same consumer, be supplied with electricity through the same meter or meters.*' That is Section 22. Section 24, '*Readings of separate meters not combined. For the purpose of making charges all meters upon the consumer's premises shall be considered separately and the readings thereof shall not be combined, except that where the City shall, for operating convenience, install upon the consumer's premises, in place of one meter, two or more meters, then the readings of such two or more meters shall be combined for the purpose of making charges.*' (Emphasis supplied) But, frankly, I don't know what the effect of operating without any ordinance whatsoever amounts to in the legal significance of this thing, but I don't think it can (320) have too much effect under the law of the case because of the fact that there is no showing—the plaintiffs have only mentioned one instance where they thought that anybody was being treated any differently than themselves and that was the case of International Airport. I am prepared to go into some of the cases on it if your Honor wants to listen to it.

THE COURT: Well, you said you wanted to argue a motion so if you want to argue, go ahead.

(Whereupon, arguments on motion to dismiss were made by Mr. Rader, Mr. Reischling, Mr. Cottis and Mr. Rader.)

THE COURT: If that is all to be said in connection with the motion, the court will deny the motion. You may proceed with the defendant's case." (R. 360, 361, 362)

Notwithstanding his admission in open court that the ordinance on which he intended to rely had been repealed, counsel for appellant has opened his case before this court by setting out verbatim, Sec. 22 and 24 of *Repealed Ordinance 55* (Repealed 8/24/49, Ex. 10). Appellant states: "In 1925, the City passed Ordinance 55, *which ordinance governed the conduct and operation of the electrical system of the city*" (Emphasis supplied). Appellant then sets out the two sections above noted. He then points out that only the municipality has by law any regulatory powers over Public Utilities in the Territory of Alaska and then states: "The City of Anchorage, in the operation of its utility, apparently, *at all times from the date of 1925 up to and including the time of trial of this action had established a policy against conjunctive billing*" or, more properly stated, the City of Anchorage had no ordinance, regulation or tariff permitting conjunctive billing . . . " (Emphasis supplied).

Approximately 2000 words covering some 8 pages of additional matter, are then written and a short 2 line statement is then made that Ordinance 55 was repealed in 1949 by Ordinance 283 (See R. 10).

We do not believe that logic will permit the conclusion that a "policy" can be shown to continue to exist when it has been shown that the Ordinance upon which the policy (if any) was based has been repealed and no similar ordinance was enacted to replace it. Neither do

we believe that a City can arbitrarily refuse to grant to a resident, otherwise qualified, the full measure of the services it has undertaken to furnish under a published rate schedule, presumptively setting forth all of the regulations and charges governing the furnishing of such services.

We submit that appellant, perhaps inadvertently, misled the court in quoting restrictive provisions of a repealed ordinance to evidence the asserted continuation of the policy prescribed by the ordinance, but which was repealed, at about the very time that he contends the “established” policy as contained in the repealed ordinance becomes helpful to his case, without clearly pointing out that the ordinance had been repealed just prior to the occurrences from which arose the present litigation. Accordingly, being unable to accept appellant’s “Statement of Facts” we must, to adequately present the legal questions, restate the facts shown by the record.

RESTATEMENT OF THE CASE

Appellee Panoramic View Corporation is the owner-operator of a garden court type apartment project, consisting of 264 apartment units contained in 14 two-story buildings erected upon approximately 17 acres of land leased from the Department of the Interior of the United States of America and located within or adjacent to the City of Anchorage, Alaska. Exhibit “H” shows the distribution of the buildings on the ground—buildings numbered 20 through 33 being those of appellee, Panoramic View Corporation. The buildings constructed (1949-1951) were designed and built in ac-

cordance with Federal Housing Administration Rules, Regulations, and Requirements. The spacing of the buildings on the ground was in accordance with FHA directives and the buildings were separated in order to provide light, air, and lawns around the apartment units. Tenant rentals are fixed by the Federal Housing Administration. The maximum number of units in any one building is 22 and the minimum 12. Each individual apartment is separately wired and separately metered, the meters for the units being located in the basement of each building. Exhibits 6, 7 and 8 are photographs of typical switchboards—meter boards—of the 22, 16 and 12-units buildings. It should be stated here that Richardson Vista, co-plaintiff in this action, owns and operates 19 buildings of 22 units each. Panoramic View, however, has 8 buildings of 22 units, 4 buildings of 16 units and 2 buildings of 12 units each. The electric power to each building is controlled by the master switch at the top center of each meter board and the meters shown thereon are the meters of the individual apartment units which measure the electricity consumed by each of the individual tenants in each building.

The house meter is shown on the lower left hand corner of the photograph of the 22-meter board and the 12-unit meter board and is the second meter from the right on the 16-unit meter board.

The house meters above referred to measure the current used by appellee corporation in each of the buildings for the common hallways, basements, entrance area ways and the small motors which pump the hot water through the radiators in the tenant's quarters from a

conversion room located in each basement where water, heated by steam, from the separate heating plant constitutes the building heating system.

(It should be clearly understood at the outset that the plaintiff's contention here *is not the total of the electricity metered to the individual tenants be combined and the rate figured on the basis of the total electrical energy consumed by said individual tenants but only that the power used by appellee corporation and measured by the house meter be combined and the declining rate applied thereto in accordance with the published rate schedule and the prior agreement of the City that it would so do and as is provided for, and in accordance with the published rate schedule for establishments using the same kind of electrical energy for but one purpose. No contention is made here that one establishment is entitled to use power in several dis-associated ways and compel the utility to combine the total of the power variously used and give to the user the benefit of a rate which might be the lowest of the varying rates offered for the different classifications of power used. Here we have one common use by one owner, upon one leasehold, and would be the same if all of the 264 units were contained within one structure wherein there would be but one meter for all of the hallway lights, areaway entrances and incidental electrical power used in the operation of the building for the convenience of the tenants*) (Emphasis supplied).

The height limitation of two stories, making it impossible to build a multi-storied building, was prescribed by the military authorities at Fort Richardson

because of the proximity of the apartment buildings to the runways on Elmendorf Air Force Base which, at the time of the construction, was a part of the Fort Richardson Military Reservation (R. 164, 187, 188).

Prior to the development of the projects owned by the appellees herein on Government Hill, that area was largely an unsettled wasteland in close proximity to Fort Richardson. There were but a few quonset huts in the entire area and there was no lighting system, sewerage system or water system, other than the water system furnished by the Alaska Railroad to the few persons who leased lots and had trailers or quonset huts located thereon. Accordingly, it was necessary for the builder to supply a sewer system, water system, sidewalks, street lighting, power for construction—in other words, all utilities ordinarily furnished by a municipality. The City had no funds or facilities for this purpose and just before ground breaking (1949) had been able to give no assurance it would be able to furnish electricity or other utilities to service the prospective project. Many conferences were held with the City officials in an effort to obtain their cooperation and because of their seeming inability so to do appellee corporations considered and made provisional plans for installing their own utilities. The steam boiler house was designed to permit the production of steam sufficient to energize steam generators which appellee corporations made arrangements to obtain from the United States Army from *Attu* and *Kiska* and prior to ground-breaking the City Council was advised the appellee corporations were contemplating the furnishing of their own power to their own tenants. Appellee corporation's intentions to furnish its own power

were abandoned in August, 1949, because of the assurances of the then City Manager, Mr. Wilson, and of the Mayor and Council to cooperate in the furnishing of power to Government Hill for the use of the prospective projects (R. 339-341, 345).

Ground was broken to the project in August of 1949, and tenant occupancy commenced about two years later (R. 338-346).

Ordinance No. 55 (Defendant's Exhibit I) was repealed on August 24th, 1949, by the Council of the City of Anchorage and signed by the Mayor thereof, by Ordinance No. 283 (Plaintiff's Exhibit 10).

At that time and prior to completion of the apartment construction project, there was in full force and effect in the City of Anchorage, Alaska, a rate schedule of the electric light and power service of the City—published in the telephone book (the only form of publication of its rate schedule then or still used by the City), which provided in part as follows:

“Schedule C — Commercial Rate

“This service is applicable to single-phase service for lighting, cooking, small appliances and incidental single-phase motors not in excess of five (5) horsepower, in professional, mercantile, industrial and other establishments not classed as single family residences.

First 25 KWHrs.....	10 cents
Next 50 KWHrs.....	8 cents
Next 50 KWHrs.....	7 cents
Next 1000 KWHrs.....	6 cents
Next 1000 KWHrs.....	5 cents
Excess KWHrs.....	4 cents
Minimum monthly charge per meter.....	\$1.00”

(R. 95)

On March 15, 1951, a project manager (Mrs. Lela Hall) was hired by appellee corporations and came to Anchorage to open the project. Among her duties was the opening up of a utilities account with the City of Anchorage, and the manager, in the preparation of her budget analysis, discussed with Mr. Robert Sharp, then City Manager, the estimated or proposed utility costs and she was at that time advised that Panoramic View Corporation would be treated as one establishment. That conversation took place to the best of her recollection early in 1951 (R. 164, 165). The manager was also advised that a bond to secure payment of the light bills would be required and initially \$7,000.00 in cash was deposited with the City to guarantee payment of the monthly light bills of the two appellee corporations (R. 178, see also R. 191, 192; R. 200-203).

Mrs. Hall testified:

“A. Well, in preparation for occupancy, there are many, many, contacts on all phases of necessary utilities. During this time, shortly after arrival, I had a conference with Mr. Robert Sharp, then City Manager. I was preparing a budget analysis and I asked for estimates, so I discussed with him the proposed utility costs and at that time I was told that *we would be treated as one establishment*. I refreshed my recollection by going back through the minutes and notes that I had referred in the minutes of the corporation, the word ‘*establishment*’ was used.” (R. 164) (Emphasis supplied)

(Mrs. Hall was not inexperienced in this line of work. Prior to assuming her position as Project Manager for appellee corporations she had been managing 1300

apartments in Seattle for the Seattle Housing Authority) (R. 206).

“Q. Actually what did you ask the City to do; combine the meter readings and give you one rate? Is that what you asked them to do?

A. We asked for combined billing, you are correct, because under the interpretation of the ordinance as it was written we believed we were entitled to a single billing because all the buildings were identical and we had been treated as one customer or had been told we were being treated as one customer.” (R. 190)

* * * * *

“A. We had been told that we would be treated as one establishment and one customer and we had discussed with them that same approach and the . . . ” (R. 191)

* * * * *

“A. I was assured by Mr. Sharp that we would be treated as one customer and I still feel that that was his commitment made.” (R. 203)

Mr. Sharp was then City Manager and Mason Lazelle was Electrical Superintendent of appellant City (R. 189-190).

The first billings for electrical energy were received by appellee corporations in September of 1951. It was at once apparent that appellant City had not only abrogated the Agreement it had theretofore made with reference to combined billing but had completely disregarded its own published rate schedule (Exhibit C). Mrs. Hall testified on this matter as follows:

“A. Yes, we were in constant contact and on the first receipted billing which came through in September, we received individual billings for each building. I took these billings back down to Mr.

Pendergras, who was then the City Treasurer, and Mr. Pendergras stated Mr. Sharp was out of town. I assumed that an error had been made. I asked him for a corrected billing. . . . In the meantime I talked to Mr. Mason Lazelle. Mr. Lazelle told me I would not be permitted to have a single billing because the National Electrical Code would not permit me to have single billings where I had individual meters. Then . . . ” (Ex. “J”) (R. 165)

* * * * *

“Q. To the best of your recollection who was present during the conversations you had with City officials?

A. Oh, goodness. I can enumerate several City officials also. Let’s put it this way: Mr. Sharp, Mr. Lazelle, Mr. Pendergras, on occasions you accompanied me, Mr. Hellenthal, at times our Maintenance Supervisor accompanied me and on other occasions Mr. Arthur Cahn accompanied me.

Q. When you referred in your testimony to being billed as one establishment, what did you mean by that Mrs. Hall?

A. Well, I was in the process of preparing preliminary budgets and during the discussions I went in to get the rate schedules and discussed our whole financial picture and at that time I was told, and Mr. Cahn was with me at the time, that we would be treated as one establishment and we got the rate schedule and discussed billing at the same time because we (124) understood there was also a deposit to be made and we wanted to prepare for the deposit.

Q. Now, in connection with the deposits did you put up a bond for those deposits?

A. Yes, we initially put up \$7,000.00 in cash and

then later secured a bond. It was about three months before the bond was processed and we put up a surety bond and that was put up by the management agency originally then by the two corporations later.” (A. 177-178).

Subsequent conferences were held in which various reasons were given by appellant City for its failure to honor its published as well as its specific contract. These reasons were:

- (1) Combined billing prohibited by Ordinance No. 55 (Repealed August, 1949, by Ordinance 283) (Ex. “I,” “10”).
- (2) Combined billing forbidden by virtue of Electrical Code (Sec. 2301) (Exhibit J). This was shown to be inapplicable.
- (3) That the City needed the additional revenue (R. 203, 206, 212, 213, 214, 216, 217) (See R. 423, 425).

Up to November 9, 1951, the date of the Council hearing at which this matter was considered, nothing had been said to Mrs. Hall by any City official with reference to any prior policy which prevented appellant City from giving effect to the published rate schedule and/or their agreement with appellee corporations. Mrs. Hall specifically testified that up to this time that she knew of no such policy (R. 235, 212, 210).

All light bills were thereafter paid under protest (Exhibits “1,” “II”).

The record further shows that appellee corporations operated the first establishments of their kind in Anchorage, Alaska, subsequent to the repeal of Ordinance No. 55, and no similar operation came into existence after the repeal of Ordinance No. 55 and before appel-

lee's operation commenced upon which the establishment of such a policy could be based (R. 226-230).

Evidence of any such policy or practice, can be found nowhere in this record to support appellant's statements that it had such a policy after repeal of Ordinance No. 55, and it is stipulated in the record that appellee corporations were charged in accordance with defendant's Exhibit A, based upon defendant's Exhibit C. the rate schedule and that there was no other published rate schedule or regulation other than that contained in Exhibit C and as subsequently promulgated and published as set forth in Exhibits C, D, E, F, G. (R. 85-98).

Counsel for appellant further stipulated in open court that appellee corporations would be entitled to receive the most favorable rate (R. 123).

No evidence was introduced by the appellant City to contradict the testimony of Mrs. Hall. Neither Mr. Sharp, who was then City Manager, or Mason Lazelle, who was then the City Electrical Superintendent, was called as a witness by the City, although the City had been fully aware for months of the pendency of this action. No testimony of any kind was attempted to be introduced by the appellant City to vary, modify, or change Exhibit C, the published rate schedule, which was admitted to be the only published rate schedule.

There was introduced into evidence a contract entered into by and between Civil Aeronautics Administration and the City of Anchorage dated July 19, 1951, by the terms of which the City sold power to the Civil Aeronautics Administration for .0282 cents per kilowatt hour, substantially less than any published rate and by a supplement dated 12-18-51 authorized and per-

mitted the Civil Aeronautics Authority to retail power to airport tenants at the International Airport. This contract is still in effect and evidences the authority of the then City Manager to act for the City in making of contracts for the sale of electrical energy (Exhibit "L").

A Mr. Willard Reuss, an electrical engineer, called by the City, testified in part as follows:

"Q. If you assume, as testified by Mrs. Hall, that each of these projects would be treated as one consumer and that friendly relations existed between the City and these project owners is it not true that the present arrangement of electrical connections is a simple and practicable arrangement?

A. I think it is evident by the way it has already been done, yes, it is a simple way to do the electrical arrangement.

Q. And it would be a practicable way of effectuating the intent of the parties if the intent of the parties was that the house consumption would be treated as one consumer?

A. I think under that assumption you would certainly have to go into the terms and conditions of the contract you would be entering into.

Q. Well, assuming, as I say, an agreement or contract between the parties that the project owner would be entitled to having house current treated as one consumption, is there any more economical or practical or feasible way of arranging the delivery of energy than it now is?

A. Physically no.

MR. RADER: *I think we stipulated, if it please the court, that this was the most economical and most*

practicable way to supply these premises with electrical energy. (Emphasis supplied)

THE COURT: Well, I thought there was some such stipulation, too, but I am not positive about it.

MR. RADER: I believe that there was.” (367) (R. 403-404)

* * * * *

By Mr. Reischling:

“Q. Mr. Reuss, do I understand your testimony correctly that the cost of serving, that is, the present additional cost of serving the halls in Panoramic View as the buildings are now wired is negligible as compared to the cost of bringing the entire output of power to the place, that is, there are 22 meters in the building for the apartment users and there is one meter that measures the power that is consumed by the halls?

A. That is true and that is also true to any customer that is added.

Q. There would not be any needed addition to the line distribution facilities themselves to serve this additional hall customer than you already have or than would have been required if the hall customer was not furnished?

A. That is correct.” (R. 391-392)

* * * * *

“Q. Then I will rephrase it. Then so far, Mr. Reuss, as I (358) understand your testimony the rates and regulations as published by a municipality for the furnishing by that municipality of utility service to the consumer are not binding upon the utility in any manner whatsoever?

A. I wouldn't say so.

Q. Well, how would they be binding?

A. What I mean to say is that your rates are indirectly based on policy. I mean, you can't separate one from the other. (R. 395-396)

* * * * *

“Q. (By MR. COTTIS): In your experience, Mr. Reuss, have you come across any other situation similar to this in these respects: a similar published tariff, a complete lack of any control through a public service commission or public utility commission or regulatory body of that nature and a complete lack of any ordinances, rules or regulations beyond what appears in these telephone-book published schedules? Have you come across anything like that?

A. You mean a situation exactly like this? *No.*

Q. Almost invariably there is some regulation, is there not?

A. Yes. May I qualify that statement?

Q. Certainly. (384)

A. Either by regulatory commission or by City council or local rule.” (R. 430)

Mr. Robert W. Retherford, an electrical engineer, who was qualified as an expert, and who had a great deal of experience in the Anchorage area, both as system engineer, or chief engineer, of the Chugach Electric Association, testified on behalf of appellees on the basis of his familiarity with the distribution system installed on Government Hill for appellee corporations (R. 277-280).

Following are excerpts from his testimony:

“Q. What is its classification as to whether it is single phase or 3-phase?

A. Yes, I guess I should add that. I believe that the buildings themselves are served with what is known as single phase, 122 4-volt 3-wire service.

Q. What sort of load is handled by the house circuits in connection with those buildings?

A. It is my understanding, from looking at the drawings, that the house circuits serve the lighting that is supplied by the owners of the building, it serves the small motors that are used in connection with the heating system and probably serves the laundries and other appliances that might be placed there by the owner." (235) (R. 282)

* * * * *

"Q. (By MR. COTTIS) : Mr. Retherford, you have examined Defendant's Exhibits C, D, E, F and G which are the various electrical tariffs that have been in effect, have you not ?

A. Yes, sir, I have seen them from time to time.

Q. In your opinion, Mr. Retherford, do the published tariffs, as set forth there, appear to preclude the opportunity for such establishments as this to obtain the benefits of single point service ?

A. No, I see nothing or have seen nothing in any of these published rates which would preclude a commercial establishment such as this from obtaining the benefit of a single point of delivery." (236) (R. 283)

* * * * *

"The third method, and in this case is probably the one that is far more practical than any of those I have mentioned so far, *is the simple method of totalizing which involves only the installation of distribution to totalize the readings of the meters that are installed as presently arranged in these*

buildings. That can be done. It can be done fairly reasonably, but there is some expense attached and there might be some question as to whether there is a good reason for installing a totalizing meter when you simply take the readings of it, add them up and produce the same results." (R. 285) (Emphasis supplied)

* * * * *

"The simplest way, I believe, is the way it is arranged there right now and that in considering this commercial establishment as one user of a commercial classification, which it is, and the facilities in the same identical classification as the apartment buildings you have pointed out, it is one user. It is a commercial user. It is the same class as those buildings. I see no reason why, especially if there has been a meeting of the minds prior to the beginning of the project, as has been testified to, that the client is one consumer, this consumer would not be given the benefits of single point metering." (R. 286) (Emphasis supplied)

Counsel for the appellant made the following stipulation:

"MR. RADER: If it please the court, we have listened to Mr. Retherford's testimony and I don't agree with some of his conclusions altogether, but certainly his factual statement as to the method of doing this and also to the fact that the cheapest and most economical method of doing it is totalizing the metering, totalizing the bill, providing you would treat them as one customer, is the most economical method, we agree with him. He is a hundred per cent correct. We will go that far in a stipulation." (R. 288) (Emphasis supplied)

(Testimony of Robert W. Retherford)

"Q. (By MR. COTTIS): From an engineer's point

of view, Mr. Retherford, what is the difference, if any, between the commercial house current used in connection with the 1200 'L' Street Apartments and the McKinley Apartments and the plaintiffs here?

A. Well, *there is no basic difference*. The only difference is physical isolation of one unit from another and that difference, if you want to bring it down into specific items, consists primarily of the wiring involved to tie them together. In the case of your 1200 'L' and McKinley buildings, the owner provided the wiring to tie all the floors of that building together, to inter-tie all of the house electrical circuits to one point. It is my impression he could have done the same thing in Panoramic View, but he was under the impression it may not have been necessary because it was cheaper to do it the way it is done now.

Q. And there is no basic electrical difference, then, from an engineering point of view?

A. No. The only difference is this physical one I explained which involves the physical—which interconnect the circuits of the owner." (242) (R. 289)

Neither the present Electrical Superintendent or City Manager was called by the City as a witness. At the close of the testimony the matter was fully argued to the court, briefs were requested and filed and the trial court filed an opinion in favor of the plaintiffs which contained Findings of Fact on which judgment was subsequently entered.

Summarized the undisputed facts are:

- (1) Repeal of Ordinance which allegedly had banned conjunctive billing except where permitted for the City's convenience.

- (2) Construction of apartment project consisting of 14 two-story buildings of some 12 to 22 units each, on unsubdivided tract of land, each building requiring electric current for the tenants therein (not involved in this suit), and each building requiring current for hallways, areaways, etc., for owner, and metered separately from that furnished tenant.
- (3) Publication by appellant City of rate schedule for power prior to occupancy by tenants of project, and providing for declining rate per KW on basis of volume of current used by "establishment" not classed as single family residence (Jan. 1, 1951, Exhibit C).
- (4) Agreement of qualified and authorized City official prior to commencement of operation of project to treat appellee as one customer (but one bond required to guarantee payment by appellee for house power used by it rather than 14 bonds which would be the case if appellant City treated each of the 14 buildings as single "ownerships"; levy and assessment of taxes by appellant City on entire project as one taxpayer rather than as 14 individual taxpayers as would be expected if appellant treated each building as being separate entity (R. 16, admitted by answer).
- (5) Installation of wiring under the direction of the City and the installation of the meters by the City, it being admitted by the City that the installation made was the most economical, feasible, and practical under the circumstances there existing.
- (6) Abrogation of its published contract (Rate Schedule, Exhibit C) by the City. notwithstanding the fact that the published rate schedule has been republished each year, or oftener, without change.

- (7) Payment of all light bills by appellee corporation made under continuing protest.
- (8) Commencement of suit in equity for injunction to enjoin City from continuing billing practice not in accord with published rate schedule, and in violation of published contract and separate agreement to prevent discrimination against plaintiffs and to recover the difference between the rate paid under protest and the most favorable rate as published.

ARGUMENT IN SUPPORT OF JUDGMENT

After concisely reviewing what he deemed to be the material facts giving rise to the instant litigation, the trial court posed the question which he believed to have been submitted to him for determination as follows:

“ * * * but as I view the case, out of the welter of contentions only two questions emerge, (1) whether a housing project consisting of several buildings erected on one tract of land and owned by one person is an ‘establishment’ within the meaning of (Schedule C) of the City’s rate tariffs, and (2) if so, whether the practice of the City in refusing to combine meter readings is in conflict with the schedule.”

The court then pointed out that under the Anchorage code of 1949, the City Manager was empowered to make and publish rates and charges for electrical energy and service and that effective January 1, 1951, the City had promulgated the rate tariff of which tariff Schedule C was applicable to the present controversy. Schedule C, the commercial rate, was then set out in full. The court then stated:

“Since it can hardly be disputed that the plain-

tiffs' housing projects are 'establishments' within the meaning of Schedule (C) the crucial questions are, (2) whether the refusal of the City Council to grant the request for combining meter readings is equivalent to an authorization or ratification of the practice referred to, and (2) if so whether the practice conflicts with Schedule (C) * * *. However, Schedule (C) necessarily implies that an 'establishment' is entitled to the benefits of the sliding scale of rates, whereas the construction placed upon this schedule by the City is that such an 'establishment' is entitled to this benefit only if the service is of the one point variety."

The court then rejected this contention stating:

"Since it effectually excluded any establishment consisting of more than one building from the benefits of lower rates for increased consumption, I am of the opinion that it was in conflict with Schedule (C) except where multiple meters were installed at the request of the consumer. Judgment may be presented in accordance herewith. (Emphasis supplied)

/s/ GEORGE W. FOLTA,
District Judge"

It is our view of the matter that no other reasonable conclusion could have been reached in this case. We believe, that the legal principles with reference to the promulgation of their rates by utilities companies have been so firmly established so as to require no extended citation of authorities. It is also a general rule that the same rules applicable to public utilities company's generally, apply to municipalities in the conduct of their utilities systems, when said system are operated by the municipality. We believe that the following is a fair

general statement of the law with reference to the publication of rate schedules.

“A public utility is bound by, and must comply with, its published rate schedule and may not void or vary it by contract or otherwise.”

(Colo.) *PUR Annual 1948 Re Burrow*, I & S, Docket No. 286, Decision 31039—1948.

“A lawfully published rate, so long as it remains uncanceled, is fixed and unalterable.”

City of Highpoint v. Duke Power Company, 34 F.Supp. 339 (1940).

“The last rate published is the legal, suable rate, and controls.”

Brown v. P.U.C., 31 Atl.(2d) 435 (1943).

A case reported in Public Utility Reports 1925 B at page 90, entitled “*Florence Laundry Company v. The Missoula Light and Power Company*” is almost exactly in point with the facts in this case. The Florence Laundry Company used large quantities of water and purchased its water from the defendant utility company. The laundry originally got water from one metered pipe to one building. It acquired a second building across the street which it adapted to laundry purposes and to a garage. Additional water was needed which was furnished by the utility company and an additional meter was installed. From 1920 to 1924 separate bills were given the laundry for water measured by each meter. In 1924 the laundry demanded a combination of meter readings and the rendition of one bill which would give the laundry the benefit of a lower rate based on the larger consumption. The water company refused this request. The

laundry refigured its bills and demanded a refund of the difference between what it had paid and what it contended it should have paid had the rates been properly figured. The utility refused to pay excepting upon an order of the Montana Public Service Commission. The rules and regulations of the Commission contemplate that all water used in substantially one service should be separately metered. Different meters are provided only when a service is distinct as represented by (1) manner of use or (2) when furnished to the same person or corporation for different purposes, or (3) to different ownerships on the same premises. In this instance all of the water was furnished to one corporation for one purpose or identical use at points so near to each other as to defy a distinction for and on account of distance or cost of service. In holding with the plaintiff corporation, the Commission stated:

“There is no distinction between the two services or between the purposes of the two meters, save the accidental circumstances of installation at a short distance apart. Clearly, the meter reading should have been combined and but on bill rendered for the combined consumption * * * a common roof, sheltering different persons and different businesses will not justify combined meter readings; that the same person owning the same kind of properties at different locations, may not for that reason have meter readings combined and that the same person owning different businesses at different locations may not for that reason have meter readings combined. In other words *there must be identity in the person of the customer, unity in the physical locations and similarity in the uses. All of these conditions occur here and operate to justify*

the consolidation of meter readings and the rendition of the bill on the consolidated statement.”
(Emphasis supplied)

An order consistent with the opinion sustaining plaintiff's prayer for overcharges was entered.

Are not the criteria the same here. There can be no question as to the identity of Panoramic View and its fourteen buildings. The unity of the physical location is established—an unsubdivided tract of seventeen acres leased to the plaintiff by the United States of America, covered by one mortgage; no question has been raised nor has it been suggested that the use to which plaintiff puts the power in each of its fourteen buildings is not identical so that we have similarity of use. Under the circumstances we believe that appellee is entitled as a matter of right to the rate to which it is entitled as a large user of electricity.

In the case of *Esmerelda Power Co. v. Nevada*, PUR 1920 E 788, a California case, it was held that a company is entitled to include the meter readings at different locations as one service so as to be entitled to lower rates for greater consumption where the different plants are operated as component parts of one business, but not otherwise.

It was held in the case of *Colonial Gardens Corporation v. Philadelphia Suburban Water Company* (1947)

71 PUR NS 497, that:

“An apartment development of 186 apartments in a group of eleven buildings on a single plot of ground is such a business establishment as to qualify it under the word ‘commercial’ appearing in a

water company's single line commercial provisions and, therefore, is entitled to single point water service as a single customer unit."

Notwithstanding the decision against it by the Public Utilities Commission of Philadelphia the water company appealed and in 1949 the Appellate Court of Pennsylvania affirmed the decision of the utility commission as reported in 64 Atl.(2d) 500. In its opinion the court pointed out that the buildings were erected on a single plot of ground owned by Colonial, and the buildings were constructed of various sizes in order to avoid uniformity. The mortgage under which the project was financed covered the entire plot and all eleven buildings (as in the instant case). The project was taxed as a single unit by the local real estate taxing bodies. Testimony in the case was to the effect that the only difference between this project and the conventional apartment building was that the units were grouped in buildings rather than being in a single structure, and that one of the reasons for this grouping was to provide light, air, lawns and the incidental conveniences offered to persons having easy access from their units to the outdoors. The court held that the development was a commercial establishment and as a consumer was a single owner corporation and was, accordingly, entitled to be billed as a single customer.

The case of *Bilton Machine Tool Co. v. United Illuminating Co.*, 148 Atl. 337, 67 A.L.R. 814 (a Conn. case), is strong supporting authority for plaintiff's position here. In entering judgment in favor of the plaintiff for the amount of overcharges paid by it to the defendant

electric company for power furnished, the Supreme Court of the State of Connecticut said:

“Basing the charge or rate by a sliding scale upon the quantity used is an accepted principle of public administration as applied to public utility corporations, and this form of classification has been upheld by the courts where neither the classification nor the rates nor charges were unreasonable.”

“(The plaintiff’s complaint) is that the defendant billed to it two bills for separate charges for power used in each of its two departments which it paid with the result that the amount of these bills greatly exceeded the amount which would have been due had the amount of power used in plaintiff’s plant been combined and the charges made for the amount used under each of the gradations of this single sliding scale of rates. . . .

“This was manifestly unreasonably discriminatory and hence illegal . . . it knew that the plaintiff was entitled to have all of the power used by it charged upon one ledger account and one bill furnished for this and it knew that if it continued two accounts on its ledger and billed each account to the plaintiff it would be receiving from the plaintiff more than it was entitled to charge and more than it charged to the corporations similarly situated.”

To the same effect:

Oklahoma Gas and Electric Co. v. Shipley, 87 S.W.(2d) 635;

Scovill Mfg. Co. v. Kilduff, 64 Atl. 218 (Conn. case).

We respectfully submit that the judgment entered in accordance with the filed opinion in the instant case,

and the injunction granted herein, is fully supported by the record and by the law. We further submit that as the record stands it is the only judgment and decree that could have been entered.

Pending determination of this matter on appeal, appellant City has continued the same billing practices as were complained of prior to and during the trial of the instant case, and accordingly, the amount of plaintiff's recovery cannot be ascertained without arithmetical computation to determine the full amount of appellee corporation's overpayment from the date complained of in the complaint herein.

ARGUMENT IN ANSWER TO APPELLANT

Counsel lists eleven points in his "Statement of Points" upon which he relies in this court.

- I. Points 2, 3, 4, 5, 6 and 9 challenge the sufficiency and weight of the evidence, and of the law, on which to predicate a judgment in favor of appellee corporations.
- II. Point 1 is a contention that he was deprived of trial by jury.
- III. Points 8, 10 and 11 challenge the sufficiency of the filed written opinion with respect to the adequacy of the Findings of Fact and Conclusions of Law therein contained upon which the judgment was entered.

Counsel then summarizes his arguments at page 17 of his brief which we believe may be fairly paraphrased as follows:

1. The refusal of the City to compute and bill appellee corporation for the total kilowatt hours used by ap-

pellee corporation as house power in its buildings at the published declining rate is permitted under an established practice which the trial court found to be reasonable.

2. The published rate schedule, not expressly providing for combined billing, must be deemed to have forbidden combined billing.
3. The court cannot fix rates different than the schedule adopted by the municipality, and the trial court here did not find that the schedule of rates published were unreasonable or discriminatory.
4. The Memorandum Opinion did not fix the measure of damages or recovery.
5. Appellant was denied its right to trial by jury.

The Trial Court Did Not Find That Appellant City Had Adopted Any "Practice" as Asserted by Appellant Counsel or That Such Asserted "Practice" Was Reasonable (Argument in Answer to Appellant)

It is at once obvious upon reading the Memorandum Opinion of Judge Folta that his reference therein to appellant City's "policy" is not a finding that any such policy existed. The court merely referred to a summarization of part of what transpired at the council meeting on November 9th, 1951, as was produced by appellant City and offered in evidence as Exhibit K, the appellant's stated reason for denying appellee's request for combined billing. The portion quoted by the court was lifted from Exhibit K and was put into the opinion for the purpose of permitting the court to make a finding or to at least draw the inference that it was obvious from this quoted portion of the record of the occurrences at that council meeting that the City officials

were fully cognizant of the fact that Ordinance No. 55 had been repealed, and were therefore attempting to base their rejection of plaintiff's request for combined billing on a statement of "policy" (R. 47, 48). The court then concluded that the City, in his opinion, would not be required to make such a practice—if it was a practice—the subject of a rule or regulation. The court found that an "establishment" would be entitled to the benefits of the sliding scale of rates and further found that it could not be disputed that appellee corporation's projects were establishments within the meaning of the published rate schedule (Exhibit C). The court then stated that if the City had made a classification which prevented a customer from obtaining the benefit of the declining rate to those situations where the power was furnished from but one service point such a classification "*could hardly be said to be unreasonable*" if it did not conflict with the published rate schedule. The court held, however, that such an interpretation conflicted with the published Schedule C and that it, accordingly, would not avail the appellant as a defense. We submit that counsel's entire argument on this phase of the case is based upon an inaccurate and misleading interpretation of the court's opinion.

Counsel has heretofore admitted that appellee corporations were billed in accordance with Schedule C (Exhibit C) as modified by Exhibits D, E, F, and G, as those rate schedules were promulgated, published and went into effect and that appellee corporation, Panoramic View, was billed as though it were 14 independent customers on the basis of its operation of 14 buildings (even though it is one establishment), and

that it was not given the benefit of the declining rate on the basis of the total consumption of power in those 14 buildings which it would have been entitled to under the published schedule if the City is bound by the published schedule (R. 82-87). It is difficult, therefore, to understand how appellant can now argue that appellee corporation has not been required to pay in excess of the published rates and why it is not therefore entitled to repayment from the City. Neither the fact that the City desires to retain the money which it obtained from appellee corporations through coercion, nor the undesirability to the City of totalizing the meter readings and the application thereto of the published declining rate are proper or persuasive matters of defense.

Counsel has cited in his brief a number of cases which he contends support his position. We have read those cases. We now assert, without equivocation, that the cases hereinafter referred to and cited by counsel as authority are not in point and do not support his position. Matter quoted out of context is never reliable, as for example: Counsel quotes at length from *Realty Supervision Company v. Edison Electric Illuminating Co. of Brooklyn* PUR 1917 B, Page 962, as authority for his position in the instant case. In that case the facts were that a "conjunctional service rider" published in the utility company's rate schedules permitted conjunctive billing to one owner or one lessee of two buildings which were not more than 100 feet apart. The plaintiff owner rented space to various tenants who were engaged in independent businesses. The owner sought to compel the utility to pool all of the electrical charges for all of the electricity used by the

various tenants and to bill him (as owner of the buildings) for the total, thus permitting the tenants to have a wholesale rate instead of the rate in effect when the tenants were billed separately. Prior to the hearing the utility filed a new schedule and the "conjunctional service rider" was omitted therefrom. The company contended that the original rider had not been intended for the purposes sought by the building owner. The Commission merely held that such a rider was not intended to permit disassociated persons or firms to band together in order to get a lower rate.

The case of *Land Title Bank & Trust Company v. Pennsylvania Public Utility Commission*, 10 Atl.(2d) 343, is not in point. That case involved the attempt of the owner of an apartment project to have all of the power used by all of the tenants billed to him on the declining rate. In rejecting the contention that the owner of the apartment project was entitled to have all of the power used by his tenants billed to him as one customer the court cited from the case of *Hunter v. Public Service Commission* (Penn.) 168 Atl. 541, stating:

"The real point at issue is whether the customer is a single commercial industrial consumer receiving water for the purpose of one business unit or whether the 34 tenants are each essentially separate and are commercial customers."

In the instant case no contention is made similar to that made by petitioners in the last two cases cited and the cases are not therefore in point.

The case of *Raceland v. Colvin*, 95 S.W.(2d) 1113 (Kentucky 1936) was one in which a dwelling, feed-

barn, garage, plus a four-room apartment and bath above the garage, all on one lot, were attempted by the owner to be combined as one customer and the owner given the benefit of a declining rate. In that case *an Ordinance of the City specified that but one building would be served by one meter*. There was also diversity of use, diversity of customers, as well as separate buildings. That case, therefore, is not in point (Emphasis supplied).

United States v. American Water Works, 37 Fed. 747, involved the efforts of Fort Omaha which had had a special contract with the City of Omaha for water service, to compel the City after it had annexed the land area embracing the Fort, to furnish to it water under ordinances at a lesser and combined rate. The Fort contained dwelling houses, barracks, hospitals, warehouses, etc. In that case the court held that the Fort was not entitled to combined billing, saying that the question was not who owned the buildings but what *was the character of the buildings, the number of them, and the use to which they were put*. In that case also the rate schedules contained distinctions based upon use. That case is obviously not in point (Emphasis supplied).

The case of *Carpenter v. Pennsylvania Public Utility Commission*, 15 Atl.(2d) 473, merely held that the commission's findings with reference to the fixing of rates, etc., could not be disturbed if they were made on competent evidence and there is not in the instant case any question as to the right of the municipality to make rates, nor any question as to the reasonableness of the rates made.

It will be noted that in his argument, notwithstanding his summaries of the arguments, the argument itself is not germane to the subject matter which it is supposed to contain. Nothing is set out in pages 17 to 33 of his brief which tends to establish any practice or policy contrary to that declared in the published rate schedule (Exhibit C, D, E, F, G).

Accordingly, we submit that the trial court did not have before it any evidence from which it could have made any Finding of Fact that the appellant City had any practice or policy other than that contained in published rate schedule.

The Published Rate Schedules, as Worded, Authorize Combined Billing (Argument in Answer to Appellant)

The testimony of Mr. Retherford (*infra*) which is unrebutted discloses that the service furnished to appellee corporation was single phase, 122 volt, 3-wire service, furnishing the power for the hall lighting that is supplied by the owners of the building, the small motors that are used in connection with the heating system and other small appliances. Schedule C, the commercial rate, specifically provides for "single phase service for lighting, small appliances and incidental single phase motors" in "professional, mercantile, industrial and other establishments not classed as single family residences," and then set forth the declining rate schedule based upon consumption. The court found that appellee corporation was an establishment as defined by this published schedule. Mr. Retherford further testified that in his opinion *there was nothing in the published rates which would preclude a commercial establishment*

such as appellee from obtaining the benefits of meter totalization and the application thereto of the declining rate based upon volume (Emphasis supplied). No testimony was introduced to rebut this.

Counsel has fixed the climate in which he argues that to give to appellee corporations that which they are entitled under the published rate schedule could have "disastrous consequences" because of (a) decrease in revenue to the City. This argument is very difficult to follow because all appellee corporations ask is that they be charged in accordance with the published rate schedule and in accordance with the agreement which was made with appellee corporations by the City's representatives at the time of the commencement of occupation of these projects. Appellees do not seek to obtain any different or lesser charge than that enjoyed by its competitors. As was testified to by Mr. Retherford (R. 289), there is no difference between the service of house current to the apartment houses known as 1200 "L" Street and the McKinley Apartments in Anchorage than that of appellees excepting that because all of the units in the first two mentioned apartment projects are located in one structure all of the house current is metered for all of the hallways, etc., by one meter. Appellee corporations believe that they should not be penalized by a different application of the published rate schedule to them than is given to their competitors merely because through circumstances beyond their control, and although their operation is identical with those of the first two named apartment projects, there is a physical separation of the owner's premises into 14 separate buildings. As is shown by the record, all of the

tenants in each of the 14 buildings must have service to each of the 14 buildings and the cost of installing the additional meter to measure the house current used is and was negligible. The number of lines and the kind and character of service would not be affected in any manner by removing the house meter from each of the meter boards and it is obvious that the time that it takes a meter reader to glance at one additional meter and note the amount of current which has been measured by that meter is also negligible. Appellant City says in effect:

“Regardless of the published rate schedule and regardless of the fact that this is one operation with one ownership on one tract of land with identical use by the owner, of the electric current furnished in each of the 14 buildings for the convenience of his tenants, by giving them hallway and areaway lights, etc., and regardless of the fact that for tax purposes we treat them as one entire establishment and for power purposes with respect to their furnishing security for the payment of their light bills we also treat them as one customer requiring but one bond to cover all of the 14 buildings, nevertheless we take the position that with regard to the application of the rates they are 14 separate customers because we want the additional revenue that we can derive by that device, and it would be disastrous to us to make us give them back their money.”

Appellant City fails to point out that prior to the developments herein, which were built on Government Hill (and including Hollywood Vista) which was then a wasteland and produced no revenue, that the City now collects annually in taxes from appellee corpora-

tion's properties a sum approximating \$140,000.00 per year together with revenue from light users, some 982 in number, approximating \$165,000.00 per year plus additional revenue from the sale of water and monthly garbage disposal fees.

The fact that a man may not want to give back that which he has illegally taken from another should be no defense when the injured party seeks redress.

Counsel has cited from pages 33 to 36 of his brief additional cases which are not germane to the heading nor to the argument and which are not in point as follows:

Re Great Falls Gas Co., Docket No. 3434, PUR (NS) 1946, Vol. 65, was a case in which the Public Service Commission held that the totaling of gas metered to all public institutions and to the school district and giving to the City a lower rate on the basis of the increased consumption constituted a rebate to the City. In that case the Commission cited *Florence Laundry Co.* (*supra*) in which it was held that a common roof—sheltering different businesses—would not justify combined billing. The court stated that to be entitled to combined billing there must be (1) *identity of the person*, (2) *unity in the locations*, (3) *similarity of uses*. *This is exactly the situation that prevails in the instant case* (emphasis supplied).

The *Pacific Gas and Electric Company* case cited in 17 PUR (NS) 1937, page 13, merely passed upon the reasonableness of rates of utilities under published schedules, the applicant contending that the rate applied to it was discriminatory because of lowered cost

of production by the utility and because other classifications of users had different and lower rates. The case is not in point with any issue involved in the instant litigation. The matter quoted in counsel's brief is out of context and not in accord with the facts herewith presented.

The Trial Court Did Not Make a New Rate Structure for Appellant City's Municipal Utility (Argument in Answer to Appellant)

We respectfully submit that in this case nowhere can there be found any evidence relating to the making or fixing of rates other than that contained in Ordinance No. 608.1 which empowered the City Manager to make and publish rates and charges for electrical energy and service, and that section is set forth in the opinion of the trial court (R. 46). We further submit that all the trial court did was to apply the published and promulgated rate schedule to the facts as were disclosed by the evidence.

Neither the argument contained in appellant's brief from pages 36 to 44, inclusive, nor the cases cited therein are either germane to this issue or in point with the issue here presented.

Whether or not a court has the power to judicially intervene or invade the rate-making functions of properly constituted authorities set up for the purpose of making rates is not a question in this case. Accordingly, we are impelled to refuse to joust at appellant's windmill.

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Return of Excess Charges Paid Under Protest Was Recognized "Measure of Damages" (Argument in Answer to Appellant)

In his summary of arguments (IV) counsel now contends that the Memorandum Opinion was defective because it did not "find or state the measure of damages or recovery, if any, to which appellees are * * * entitled." The record at pages 89 through 94 discloses the fact that prior to the commencement of taking testimony it was agreed by counsel for appellant City that if appellees were entitled to recover they would be entitled to the difference between the amounts which they had paid under protest and the amount which they would have been required to pay had the proper rate been applied in the proper manner to the operations of appellee corporations. Nothing more is involved other than arithmetical computations which must await final determination of this action.

The Memorandum Opinion Contained Sufficient "Findings" (Argument in Answer to Appellant)

The trial of the above-entitled cause was commenced on March 24, 1955, before the Honorable George Folta, District Judge, and continued through March 29th, 1955. Subsequently, briefs were filed by both parties and on May 25th, the court filed its Memorandum written opinion in favor of plaintiffs concluding with the words, "judgment may be presented in accordance herewith." Shortly after filing his Memorandum Opinion the trial court died. Motion for new trial was made by appellant and filed on June 30, 1955, in which mo-

tion in addition to the other matters and things herein discussed appellant challenged the sufficiency of the Memorandum Opinion on which to enter a decree. The motion for new trial was denied by the Honorable J. L. McCarrey, Jr. (the successor to Judge Folta), District Judge, on August 31, 1955 (R. 64).

Prior thereto appellant had filed objections to the entry of judgment on the Memorandum Opinion upon the same grounds which were argued at length before the Monorable J. L. McCarrey, Jr., District Judge, which objections were overruled, and judgment and decree entered on June 21st, 1955 (R. 58).

“It has been held that for some purposes, a judgment may be regarded as existing as soon as it is pronounced, particularly where nothing remains to be done except to record the entry of the Judgment, and a number of cases have held that the decision of a court constitutes its Judgment. The signing of an Opinion may, for certain purposes, be regarded as a pronouncement of Judgment in open court.

Dohany v. Rogers, 281 U.S. 362, 68 A.L.R. 434, 50 S.C. 299.

“Further, it has been held that as between the parties themselves the entry or recording of a Judgment is not essential, although to be effective as against third persons, recording of a Judgment may be essential.” 30 Am. Jur., page 824, 825.

“Further, it has been held that it is not essential that any artificial or technical phraseology or any prescribed form of expression be employed by a court in the rendition of a Judgment to make the same valid and effective. It is merely necessary

that the Judgment appear to be the act of adjudication of the court.

Bell v. Otts, 13 So. 43 (Ala.).

“It would also appear that no form of words and no peculiar formal act is necessary to evince the rendition of a Judgment.”

United States v. Hark, 320, U.S. 531, 64 S.C., 359. Rehearing denied, 321 U.S. 802, 64 S.C., 517.

See 52 A. Federal Rules of Civil Procedure as cited in *Grip Nut Co. v. Sharp*, 150 F.(2d) 192, where it was held that the trial court has the primary function of choosing from among conflicting factual inference and conclusions those which it considers most reasonable and the requirement of the Rule (52 A.) that a district court makes Findings of Fact and state Conclusions of Law must only be reasonably complied with. *Smith v. Dental Products*, 168 F.(2d) 516.

The Federal rules of civil procedure have been adopted by and are followed in the Territory of Alaska by the courts thereof.

Rule 63 of the Federal Rules of Civil Procedure reads as follows:

“Rule 63. Disability of Judge.—If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court, under these rules, after a verdict is returned or Findings of Fact and Conclusions of Law are filed, then any other judge regularly sitting in or assigned to the court in which the action is tried, may perform

those duties ; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion, grant a new trial.”

In the notes of the advisory committee on Rules, it is stated that this Rule adopts and extends the Provisions of USCA, Title 28, former Sec. 776 (Bill of Exceptions; Authentication; Signing of By Judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

Under the statutes of the Territory of Alaska, it has been provided that a successor judge may sign a Bill of Exceptions in the event of the death of his predecessor. It would therefore appear that by statute itself the Territory followed Sec. 776 of Title 28, USCA, and by adopting the Federal Rules of Civil Procedure, the Territorial District Court has full power and authority to enter a formal judgment as was herein entered.

A case almost directly in point is the case of *Makah Indian Tribe v. Moore* (D.C. Wn.) 1950, 93 Fed. Supp. 105, reversed on other grounds, 192 Fed.(2d) 224. In that case it was held that where the judge who tried the case announced his decision against the plaintiffs and for the defendant *in an extended oral Opinion which contained a statement of the essential ultimate facts in dispute and applicable rules of law, and the Opinion was transcribed by a reporter, copies were given to counsel, and one copy was placed in the clerk's file, but the judge died before normal Findings of Fact or Conclusions of Law, or Judgment were submitted to him,*

the judge who was thereafter assigned to sit and hold court in that district, had the power to sign the formal Judgment in accordance with the announced decision of the decedent judge.

It is obvious from an examination of the filed opinion that Judge Folta did not intend to enter Findings of Fact and Conclusions of Law other than those contained in the Memorandum Opinion, as he stated that: "Judgment may be presented in accordance herewith."

In a case somewhat analogous to the situation thus presented is that of *Patton v. Baltimore & Ohio Ry. Co.*, D.C. (Penn.) 1954, 120 Fed. Supp. 659. In that case, the court held that where the evidence in the trial, after a remand, was substantially the same as the evidence in the first trial, and the trial judge had denied a motion for a new trial sought because of asserted errors in rulings upon evidence, and the Court of Appeals had approved the rulings on appeal from the Judgment in the first trial, a motion for a new trial, sought on the ground that the judge assigned to the case after the death of the trial judge would be unable to perform the duties to be performed in passing on the motion for the new trial would be denied.

We submit that on the basis of the City's own published rate schedule, no court could find that the published rate schedule did not warrant the giving to Panoramic View Corporation the advantage of the declining rate, as an establishment for quantity use. The record speaks for itself and is conclusive on this point.

In the case of *Lashbrook v. Kennedy Motor Lines*, D.C. (Penn.) 1954, 119 Fed. Supp. 716, on a motion for

a new trial or Judgment *n.o.v.* for plaintiff in an automobile collision, brought on for hearing after the death of the judge who presided at the trial, it was held that the record was sufficiently clear and complete to warrant the other judge's disposing of the motion without hearing the case *de novo*.

We submit that there is before this court a complete record, including a filed, comprehensive written opinion of the trial court, containing sufficient Findings of Fact and Conclusions of Law and that to grant a new trial would be to subject both parties to this controversy to additional needless expense. We further submit that on the basis of the law and on the basis of the record with respect to the publication of Schedule C, there can be no change in the conclusion which inevitably must be reached on the basis of that evidence, and while it may be that the City feels itself hurt as the result of the decision by Judge Folta, its hurt is due to its own irresponsible act in refusing to follow its own published schedule and its refusal to accord to this plaintiff the benefit of the declining rate for increased consumption as provided for in that schedule. Had the City followed its own schedule, this case would never have been brought, and in good conscience, any argument advanced by the City, no matter how adroitly worded, should not be permitted to confuse the issue and to becloud the right of the plaintiff to recover its own money which the City has collected without legal right, and used for its own purposes. This is not a suit for damages. This is a suit to recover back the money owned by Panoramic View Corporation and illegally extracted and collected from it.

The Appellant Was Not Entitled to Trial by Jury (Argument in Answer to Appellant)

Shortly after court convened for the purpose of trying this action the following occurred:

“MR. RADER: If it please the Court, it is an action which is primarily an action in which it is alleged discrimination, discriminatory rates and discriminatory application. Several items of fact have to be decided and I would assume that we had a right to a jury trial on it.

THE COURT: Just because there are questions of fact, that isn't what gives you the right of a jury trial. It is the nature of the action. What have you to say about that?

MR. RADER: The action is pursuant to Territorial Statute. I can't state whether it is an action for loss of damages—it is an application for a refund of—

THE COURT: It asks for injunctive relief. Unless you contend that is merely camouflage it would appear to be an equitable action.

MR. RADER: I don't know about camouflage, but I think they probably did want injunctive relief all right. As to the future I assume that the injunctive relief would apply, but as to the past it is the question of discrimination. I think that it is a matter of reasonableness of rates and rate classifications.

THE COURT: *I am inclined to think it is a non-jury case.* Well, you may proceed with your proposals then.” (R. 80-81) (Emphasis supplied)

Rule 39 of the Federal Rules of Civil Procedure, provides as follows:

“Rule 39, Trial by Jury or by Court.

“(A) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be

designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless * * * (2) *the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.*" (Emphasis supplied)

Under the above-quoted Rule, it was held that:

"Where principle demand of Bill of Complaint was for injunction and alternative demand was for damages, the plaintiff was not entitled of right to a jury trial on the issues for injunction, but such was discretionary with the trial court."

Miss. Pac. Transportation Co. v. George
(Ark. 1940) 114 F.(2d) 757.

"In considering whether action is equitable or legal for purpose of determining whether it is triable by judge or jury, the court may consider the nature of the plaintiff's prayer for relief."

St. Farm Mut. Auto Ins. Co. v. Mossey (C.A. Ind. 1952) 195 F.(2d) 56, certiorari denied 73 S.Ct. 109.

"Form of complaint and nature of relief prayed for must guide the trial court in its determination as to whether the trial shall be to a court or by jury."

Canister Co. v. Leahy, 191 F.(2d) 255.

"The right to jury trial is determined by whether the issues as disclosed in the complaint are essentially legal or equitable in nature."

Russell v. Laurel Music Corp. (D.C., N.Y., 1952) 104 F.Supp. 815.

In the recent case of *Howard v. U. S.*, 214 F.(2d) 759,

it was held that in an action by the United States to require a landlord to make restitution of overcharges the landlord was not entitled to a jury as the action was an equitable one.

CONCLUSION

Appellee, Panoramic View Corporation, hereby respectfully submits that the Judgment of the Trial Court was correct and that it should be affirmed.

Respectfully submitted,

F. M. REISCHLING

ALBERT MAFFEI

Attorneys for Appellee

Panoramic View Corporation.

No. 15,082

United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,

vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEE

RICHARDSON VISTA CORPORATION.

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FILED

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Appeal from the District Court for the
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BRIEF FOR APPELLEE RICHARDSON VISTA CORPORATION.

PRELIMINARY STATEMENT.

Statement of facts, as restated by appellee Panoramic View Corporation, is substantially correct, noting, however, that no public hearing, as described by appellant on page 6 of its brief, was held by the City Council, and that instead, appellees merely appeared at a regular council meeting to discuss their grievance, which was set forth in a letter addressed to the Mayor and City Council dated November 9, 1951, two days prior to the regular council meeting. (Exhibit 1.)

ESSENTIAL UNCONTROVERTED FACTS.

Appellees are owners of nineteen (19) buildings located on one tract of unsubdivided land in the City of Anchorage, leased for a long term by Richardson Vista Corporation from the United States Army, and fourteen (14) buildings located on another tract of unsubdivided land in the City of Anchorage, leased by Panoramic View Corporation for a long term from the United States Government, Department of the Interior. The tracts abut one another.

On each tract is built a commercial establishment consisting of garden court type apartment buildings that are managed by a single business entity. The buildings are uniformly used for apartment dwellings, under uniform leases, with common maintenance and supervision. For property tax purposes, each appellee's tract is treated by the City of Anchorage as a unit; the city likewise treats each tract as a separate establishment in requiring but one utility payment bond from each appellee corporation, not 19 and 14 bonds. (R. 150, 178.)

The appellees' buildings were erected pursuant to regulations of the Federal Housing Administration, and appellees' loans and mortgages were insured by Federal National Mortgage Association.

Appellees' buildings are separated in order to provide light, air and lawns around the apartment units and to avoid a mechanical, uniform outlook; appellees, in financing their project, each entered into a single mortgage as to its separate interest, covering the entire plat and real estate upon which all of each

appellee's buildings are located; the two projects are strikingly similar, almost identical, to the Colonial Gardens project described hereafter in this brief on pages 3 and 4.

Appellees' buildings were occupied in 1951.

Appellees provide "house current" for the projects, that is, electricity for halls, entries, laundry rooms, outside floodlights; each tenant provides for his own consumption of electricity in his apartment, and each tenant is separately metered for this consumption. We are not concerned with this tenant usage of electric current in this case.

Appellant city had absolutely *no* rules, regulations or ordinances governing the sale of its electrical energy other than the tariff schedule called Schedule "C", published periodically in its telephone books (at R. 361 counsel for appellant states: "* * * it puts the utility company in a situation as having operated completely without any ordinance as to the matters in essential dispute in this action").

Schedule C was entitled "*commercial rate*" and was "applicable to * * * *establishments* not classed as single family residences" and provided a diminishing sliding scale of rates based on volume of consumption. (R. 47.)

Prior to August, 1949, the appellant City of Anchorage had a 29-year-old ordinance, number 55, regulating electrical installations where more than one building was located on one tract of land owned by one customer; this ordinance was repealed in

August of 1949, and Schedule C enacted as the sole and only rate schedule and rate regulatory ordinance of appellant; no other regulations pertaining to electric rates were ever enacted by appellant during the period of time with which this case is concerned.

Appellees were clearly governed by the unambiguous provisions of Schedule C, because each appellee consisted of *one commercial establishment*; each of appellees, before becoming electrical consumers of the City of Anchorage were led to believe that each of them would be treated as one customer of the City of Anchorage; when appellees received their first billing from appellant for electrical consumption, they found that each of appellee's buildings was treated as a separate customer for rate purposes; this matter was protested orally, and in writing, to the governing body of appellant, but appellees were not classified under the provisions of Schedule C, because the City Council erroneously believed that the electrical safety code prevented the granting of appellees' request, or perhaps because that body failed to study the request in the light of its Schedule C, or because that body refused to believe its Ordinance 55 had been repealed two years before.

From the date of their first payment for electrical services furnished by appellant city, each of appellees formally protested each monthly payment in writing, and made every payment for electrical services under written letter of protest. (Exhibit 1; R. 176.)

Appellees promptly brought this proceeding to enjoin appellant from charging each of appellees the

erroneous rate in the manner aforescribed, and for an order compelling the appellant city to apply the commercial rate, as set out in Schedule C, to each of appellees' total consumption, and to be ordered to desist from charging each of appellees' buildings as if each building were a separate consumer of appellant, and, further, that the appellant city be ordered to repay overcharges to each of appellees. (R. 10, 11.)

The United States District Court for the District of Alaska, in written opinion, held that the appellees' housing projects fell squarely within the meaning of Schedule C, and that appellees were each entitled to the benefits of the sliding scale of rates, i.e., the "lower rates for increased consumption".

POINT ONE.

SIMPLE MATTER OF TARIFF CONSTRUCTION.

Simple Logic Compelled the Conclusion Reached by the Trial Court.

The only reasonable construction of the city's published tariff, Schedule C (Exhibit A), after the repeal of Ordinance 55 in August of 1949, requires a single billing for the total "house current" used in each commercial establishment of each of appellees. Each building was thus erroneously treated as a separate customer.

Some of the many reasons for recovery under Point One above are as follows:

A. The tariff applicable to appellees' electrical usage was Schedule C (Exhibit A); this was in effect without change during the period 1951 to 1954, inclusive; appellees fell squarely into the classification therein created; each of appellees was a commercial establishment—the tariff was clear.

(1) The law is settled that such tariffs are most strictly construed in favor of the customer and against the utility company—in this case the city.

(2) There is no question but that appellees were each engaged in commercial activity.

(3) Although appellees' apartments are built in many buildings, they are one establishment (*Chrysler Corporation v. Smith, et al.*, Michigan Supreme Court, 1941, 298 North Western 87; *Spielman v. Industrial Commission, et al.*, Wisconsin Supreme Court, 1940, 295 North Western 1; *Philadelphia Suburban Water Co. v. Pennsylvania Public Utility Commission*, 64 Atlantic 2d 500, Pennsylvania Superior Court, 1949; see also *Ford Motor Co. v. New Jersey Department of Labor and Industry*, 71 Atlantic 2d 727, 730, where the "establishment" cases are collected and analyzed.)

(a) In the *Chrysler* case, above cited, or 298 North Western 87, various co-ordinated plants within eleven miles of the Dodge main plant, synchronized and employed by a corporation in the Detroit area in the accomplishment of a common end, namely, the manufacture of automobiles, constituted a single "establishment" within provisions of Michigan Unemployment Compensation Act, and in the *Spielman* case,

295 North Western 1, under a similar Wisconsin Unemployment Compensation Act, two plants, 40 miles apart, that were synchronized and co-ordinated, were held to be a single establishment for the manufacture of automobiles "as they would have been had they been in two buildings adjacent to each other".

(b) Appellees used as a basis of their complaint *Philadelphia Water Co. v. Pennsylvania Public Water Commission*, decided March 15, 1949 and reported in 64 A. 2d 500, and in which the Philadelphia Suburban Water Company, or "water company", was ordered by the Public Utility Commission to provide single-point water meter service to the Colonial Gardens Corporation at its eleven-building apartment development in Delaware County, Pennsylvania. The water company appealed the commission's decision and Colonial intervened.

The Colonial project was financed by F.H.A. in 1940 and consisted of eleven two-story buildings comprising 186 apartments. They were arranged into buildings of various sizes in order to avoid monotonous uniformity. All were erected on a single plot of ground owned by Colonial through which a private road was cut for the convenience of the tenants. The mortgage under which the project was financed covered the entire plot and all eleven buildings. The project was taxed as a single unit by the local real estate taxing bodies, had a single superintendent and was supplied with gas and electricity under single-point meter service by the utilities providing those services. The vice president of the corporation testi-

fied that the project differed from a single apartment house only in that the apartment units were grouped in separated buildings of varying sizes and that this separation was to provide light and air and grass around the dwellings and to avoid a "mechanical uniform outlook".

The Court held that the development was a single establishment as the consumer was the corporation rather than the tenants. The tariff made use of the same two words as the Anchorage electrical tariff, namely, "commercial" and "establishment".

The Court cited cases to support this contention.

The Court further held, at page 503 of 64 A. 2d, as follows:

"Further, the evidence supports the finding here assailed; the testimony of Colonial's vice president is adequate to establish that there was a uniform use of the property for apartment dwellings, with uniform leases in which all utility services were covered by the rent, with common maintenance and supervision, common garage facilities, on a single tract mortgaged as a unit, taxed as a unit, and billed for utility services as a unit. Such a factual situation, under the decisions of this Court, establishes a case where single-point service is proper."

The *Land Title Bank & Trust Co. v. Pennsylvania Public Utility Commission* case, 10 A. 2d 843, which case is curiously cited by appellant at page 26 of its brief (note appellant's avoidance of pointing out the following distinguishing fact in its brief), was dis-

tinguished at page 503 on the grounds that in that case there was a diversity of ownership which precluded classification as a wholesale consumer and that "Combination of the various individual consumers in that case was not permitted; *in this case, of course, there is but one owner—Colonial—and but one consumer—Colonial.*" (Italics supplied.)

The Court stated at page 504:

"* * * *the coincidence of uniform ownership with uniform use of the premises places Colonial in the category of a single commercial consumer* * * *"
(Italics supplied.)

and upheld, under a tariff similar to that of appellant city, the decision of the commission.

B. Our case cannot be distinguished from the Pennsylvania case cited above, the *Colonial* case, 64 Atlantic 2d 500, where identical utility customers were treated as one customer and where the Court held that any application, other than one application of the rate, was improper.

(1) Appellees had identical construction consisting of many buildings under F.H.A. planning; appellees each had a blanket mortgage; appellees' tracts were not subdivided and were taxed as single units, etc.

(2) The striking and classical analogy, well known to jurists and physicists, between water and electricity, is again forcefully illustrated by the facts of this case. The clear, cold logic of the Pennsylvania case governs this situation.

C. Appellant owed the duty and obligation to appellees to inform them of the most favorable rate applicable to their type of consumption and to apply that rate.

(1) This principle is merely common sense and applied clearly to a city acting in a proprietary non-governmental capacity, such as appellant in its relation to appellees.

(2) Appellees offered to bear the added expense, if any, of whatever distribution system was required to make power available at the most favorable rate—i.e., one application of the commercial rate; and even offered to pay for line and transformer losses in accordance with the established electrical engineering practices—all to no avail. (R. 175, 343, 344.) Appellees' evidence in this respect is not controverted. Subsequent evidence showed that no additional expense *was* required, but that the distribution system as designed and built was actually the most appropriate. (R. 285 et seq., R. 404.)

(3) Appellees had no duty under the "most favorable rate" principle to make the offer referred to in the subparagraph immediately preceding. This tariff analysis should have been made by the utility company, but despite appellees' gratuitous offer, appellees were denied the rate to which they were entitled.

(4) The city failed to distinguish between the two problems that confront any utility company: that of *delivering* the service to the customer, and that of *metering* the consumption. (R. 284.)

D. Apparently appellant believed that Ordinance 55, passed and approved by the City of Anchorage thirty-odd years ago, was still in effect. Counsel for appellant: "I am surprised by the fact it was repealed, actually." (R. 360.)

(1) Ordinance 55 incorporated the National Electrical Code, by reference, in its first seven (7) sections. When appellant frequently stated to appellees that the national code forbade thee installations sought (again uncontroverted testimony), appellant must have referred to Ordinance 55. (Incidentally, the national code did not prevent the installation sought, and appellant abandoned this position at the trial.) (R. 402.)

(2) Appellant, during the early stages of the trial, insisted that Ordinance 55 was still in effect, and appellant was confused and amazed when it was proved, at the close of appellees' case, that Ordinance 55 had been repealed in August of 1949. Counsel for appellant: "Frankly, this comes as quite a surprise to me because of the fact that I had no knowledge * * * *" (R. 359.)

There had been a profound change in city administration after the filing of pleadings herein, and it is not unreasonable that the new personnel—new city manager, new attorney, new electrical superintendent—were not aware of past city history, and lacked accurate knowledge of city ordinances.

(3) Appellant's illogical and inexplicable attitude toward appellees becomes clear when it is realized

that it was predicted on a mistaken belief, inherited from prior city officials, that Ordinance 55 was in force. Counsel for appellant, before the first testimony was adduced: “* * * I know that there will be an argument as to its repeal and whether or not it is still effective.” (R. 128.)

(4) The first seven sections of Ordinance 55 were preserved because the principle therein contained—i.e., adoption of national code—was later incorporated in Chapter 10 of the Anchorage General Code; the remaining twenty-two (22) sections were repealed (Sections 7 to 29, inclusive) because these matters properly belonged, and were later inserted after deleting provisions the City Council no longer wanted, where the City Council desired that they should be retained, in Article 6, entitled “Electrical Distribution” of Chapter 3 of the Anchorage General Code entitled “Public Works and Utilities”. Chapter 3 of the Anchorage General Code provided that the city could make rules and regulations governing the rendition of service, and it is noteworthy that *no regulation was ever adopted prohibiting combined billing of single customers or requiring separate billing where separate meters were installed*, such as the old Ordinance 55 had provided.

(5) The city's expert witness himself admitted that he had never run across a similar situation—i.e., where the utility company had no rules, regulations, but based its electrical distribution upon such a skimpy set of regulations as that appearing in the telephone directory. (R. 420.) To follow the city's

contentions would permit it to improvise after the fact retroactive conditions for the application of its rates for electrical service.

(6) The rates, or combined billing, sought by appellees were not precluded by any portion of the National Electric Safety Code; appellant offered no proof to this effect and abandoned the city's prior position in this regard.

POINT TWO.

OTHER REASONS EXISTED FOR DECISION.

**Other Grounds Existed Which Justified Decision for Appellees;
The Trial Court Could Also Have Correctly Decided the Case
on These Grounds.**

Appellees relied, to their detriment, upon the city's statement of its interpretation of the rate schedule. (R. 164, 190, 191, 203, 345, and much other evidence.)

Appellees could have installed their own electrical generators. Their boiler house was designed, with this in view, for twice the capacity needed in supplying heat to their establishments. One of their officers went to Whittier, Alaska, to discover the whereabouts and negotiate the purchase of surplus generators on the Aleutian Islands.

The city, fearing competition as an electrical supplier from other electrical suppliers in the vicinity, assured appellees among other things that it would treat each appellee as one customer with respect to electrical rates. No other similar establishment existed in or near the City of Anchorage at that time.

Appellees relied upon the city's assurances, abandoned their plans to install their own generators, permitted the city to connect each establishment to the city's distribution system, complied with its instructions regarding the number of meters, constructing each establishment and its many buildings for separate service drops (which method of installation is the best from an engineering standpoint whether each corporation is a customer or each building a customer (R. 286, 288, where appellant stipulates it is the cheapest and the most economical method)), permitted the apartments to be occupied, and made immediate complaint when the city after several months' tardiness finally sent its first billing for house current as if each apartment building were a separate establishment instead of a part of an integrated whole.

The then city manager of Anchorage, Robert Sharp, was not called as a witness by the appellant to refute any of appellees' testimony, nor was the failure to call Sharp explained by the appellant.

POINT THREE.

NONEXISTENT "POLICY" WILL NOT DISPLACE TARIFF.

"Policy" Will Not Justify Overcharges.

Nor can the city stand on its desperate and tenuous position that it had some sort of "policy" justifying its overcharges. Any policy shown rested upon the situation as it was long before the repeal of Ordinance 55, which required separate billings for separate meters; it was not shown what, if any, tariff

existed at that time. In any event, policy is a proper subject for consideration only where it is clearly apparent and only where a law or tariff of doubtful meaning or application is being construed. (50 Am. Jur., p. 279.)

“The supposed policy of a state cannot, in a judicial tribunal, prevail over the plain language of a statute. A Court is not free, in construing a statute, to substitute its own ideas as to the policy of the law, and where plain and unambiguous words or phrases are employed by the legislature they are not to be restricted in their operation by reference to a policy of the law not indicated in the statute. Such a rule applies to the policy of the common law which cannot restrict the operation of a statute expressly covering the subject. Considerations of policy are entitled to weight in the construction of statutes only in cases of doubtful interpretation, and where the meaning and intention of the legislature appear to be opposed to the literal import of the language of the act.” (50 Am. Jur., p. 281.)

All the experts' testimony was to the effect that appellees' establishments had been wired in the most economical and feasible method (R. 286, 288, by stipulation), namely, with a separate service drop to each building, since the apartments were spread out in a series of two-story structures with playgrounds and lawns between them, instead of being housed under one roof many stories high. Because this feasible and practical method was used to *deliver* the electricity, appellant has sought to penalize appellees by using a method to *meter* the electricity different from that used with its other apartment house customers.

CONCLUSION.

This is an extraordinarily clear case in that a clearly worded tariff governing electrical utility rates was ignored by appellant. The appellees fell precisely into the classification created by the tariff (Schedule C) and were entitled to the rate prescribed in the tariff.

The trial Court was correct in so holding, and in following the precedent of the *Colonial* case, above cited, namely, "the coincidence of uniform ownership, with uniform use of the premises, places appellants in the category of a single commercial customer".

Appellant's talk of "disastrous consequences" is entirely unsupported by the record. (Appellant's Brief, p. 56.) Far from being disastrous, appellant obviously has a very lucrative business in connection with these two projects. It collects upon a separately metered, nongraduating basis from each of 418 families at Richardson Vista and from each of 264 families at Panoramic View (R. 4) with little of the normal expense incurred by utility companies in servicing such a concentration of power purchasers.

Even if appellant's talk of disastrous consequences were supported by the record, and of course it is not, it has no bearing on the issues. Likewise, the other arguments of appellant are based on premises that are unsupported by the record, i.e., talk of discrimination where the trial Court's decision did not rest on discriminatory practices, i.e., talk of tariffs which are entirely different from the tariff or rate schedule here presented. This verbose arguing on appellant's

part is indicative of the weakness of its position and its so-called arguments or points are in reality desperately spawned red herrings.

The decision of the trial Court must be affirmed.

Dated, Anchorage, Alaska,

August 20, 1956.

Respectfully submitted,

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No. 15,082

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,

VS.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Appeal from the District Court for the
District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

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No. 15,082

United States Court of Appeals For the Ninth Circuit

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VS.

RICHARDSON VISTA CORPORATION and
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Appellees.

Appeal from the District Court for the
District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

INTRODUCTORY RESTATEMENT OF THE CASE.

This case is not as difficult as the detailed Briefs and Arguments before this Court might indicate. Briefly, the facts, issues and contentions are as follows:

The City of Anchorage Electrical Utility serves each of the appellees' thirty-three buildings, spread over 40 acres, with house power. The City bore the expense of the distribution system and placed a meter in each building on the meter panels provided by the appellees. The wiring and distribution system are "typical" (R-282).

The City Rate Schedule stated that Schedule C was for “establishments” not classified as single family residences. The published schedule is silent on conjunctive metering or billing. However, from 1925 to the time of the trial, there had never been an instance of combined billing or metering for any city customer with separate service drops—i.e., separate points of delivery and separate meters, situated similarly to appellees’.

The appellees each contend: (a) That their multiple buildings are an “establishment” entitled to have all meter readings combined as though there was one meter and one point of delivery; and (b) discrimination.

The District Judge apparently found that appellees were entitled to conjunctive billing unless the multiple meters were installed at appellees’ request.

The Appellant City contends that:

1. The City practice of not combining meter readings has been expressly approved by many courts and utility regulatory commissions.

2. The Trial Judge found the practice and classifications of the City to be reasonable when the City defined “establishment” as being one point of delivery with one meter.

3. All other consumers similarly situated were treated the same. There was no discrimination proved or found.

4. Conjunctive billing will not be permitted under the law unless an express provision for the

same is made in the tariffs of the utility—and no express provision exists. The absence of a conjunctive billing rider in a schedule means conjunctive billing will not be permitted.

The Trial Judge, however, decided that because the appellees could save money with combined metering or billing, they were entitled to the same, retroactively.

It is submitted that the fact it cost the appellees more than an admittedly reasonable practice, definition and classification, is not a basis in law for ordering the repayment of money. There must be a finding that for one reason or another the differential in cost was unlawful before there will be judicial intervention. These reasons in the reported cases are: (a) discrimination, and (b) unreasonable rate or classification. These were not found; therefore, the judgment cannot stand.

The collateral issues are:

- a. Appellant was deprived of a jury trial;
- b. The opinion of the Judge was insufficient in findings of facts and conclusions of law. (Damages, injunctive relief, item (c) *infra*, etc.):
- c. The Trial Judge, in effect rewrote the Utility Schedule, and applied the same retroactively, by creating and defining a new (but inadequate) combined billing rate schedule, conditioned upon who *requested* multiple meters. The Trial Judge failed to find (in the case at bar) this precise point; and
- d. Judicial rate making is improper.

Although appellant does not believe that appellees have reasonably met the issues, an abundance of caution and the disastrous effect of the decision on the financial solvency of the City Utility dictates a somewhat detailed answer to appellees' brief.

NOTE: *As of date of mailing this brief to printers, August 30, 1956, Appellant has not received printed copy of appellee, Richardson Vista brief; therefore, all references herein to "Appellee's Brief" refer to brief submitted by appellee, Panoramic View Corporation.*

(A) APPELLANT DID NOT MISLEAD THE COURT (IN ANSWER TO APPELLEE'S FOREWORD).

The appellee, Panoramic View, in its brief on page 5 suggests that the appellant has misled the court in regard to the status of Ordinance 55. Appellee suggests that appellant "perhaps inadvertently" caused the court to believe that the ordinance remained in effect subsequent to its repeal in 1949. It is upon that basis that appellee felt it necessary to restate appellant's statement of the facts (see page 5, Appellee's Brief).

Appellant does not believe that it, in any manner, misled this court or failed to state the true facts. On page 10 of appellant's opening brief, in its statements of facts, appellant said:

"At the time of trial it was shown that Ordinance 55 had in fact been repealed by Ordinance 283 in 1949 (Exhibit 10). It also appears that no

other similar ordinance was enacted by the City of Anchorage, although rate schedules were published in the City of Anchorage telephone directory.”

Appellant also in its statement of facts set out verbatim the opinion of the Trial Judge, George W. Folta, which on no less than three occasions makes mention of the fact of repeal of Ordinance 55. See the opinion in *Appellant's Brief*, page 13, in which the District Judge, in referring to sections of Ordinance 55, states as follows:

“The sections containing these provisions had, however, been repealed on August 24, 1949, by Ordinance No. 283, without a reenactment of these provisions.”

See further in the judge's opinion, on page 14 of *Appellant's Brief*, where the Trial Judge stated as follows:

“Although it may be inferred from the testimony that the repeal of the provisions of Ordinance No. 55 was inadvertent and that the City Council and officials were ignorant thereof, . . .”

Later, also in the judge's opinion, on page 14 of *Appellant's Brief*, where the District Judge stated:

“It is conceded that after Ordinance No. 283 became effective no rule or regulation was adopted prohibiting conjunctive billing and plaintiffs argue that in the absence of such a rule or regulation the practice referred to was unauthorized. . . .”

Appellant in its brief makes frequent reference to the fact that Ordinance 55 had been repealed and on page 33 of *Appellant's Brief* it is stated:

“At the onset it must be admitted that Ordinance 55 (prohibiting conjunctive billing except when the facilities are independently metered for the convenience of the utility consumer) was repealed in 1949 (Exhibit 10). The appellees interpret this to the effect that because this provision was repealed such a practice is now approved. . . .”

Appellee's suggestion that appellant misled the court is not well taken.

(B) APPELLANT'S UNIFORM AND NON-DISCRIMINATORY POLICY AND PRACTICE CONCERNING BILLING IS SUPPORTED IN THE RECORD AND RECOGNIZED BY THE TRIAL JUDGE (IN ANSWER TO APPELLEE'S FOREWORD AND ARGUMENT (AT PAGE 30)).

Appellee in its Foreword and Argument (page 30 of Appellee's Brief) stated the City of Anchorage had no established policy or practice relative to conjunctive or combined billing. Appellee's statement of facts on page 13 of its brief states as follows:

“The record further shows that appellee corporations operated the first establishments of their kind in Anchorage, Alaska, subsequent to the repeal of Ordinance No. 55, and no similar operation came into existence after the repeal of Ordinance No. 55 and before appellee's operation commenced upon which the establishment of such a policy could be based (R-226-230).

“Evidence of any such policy or practice can be found nowhere in this record to support appellant’s statements that it had such a policy after repeal of Ordinance No. 55, and it is stipulated in the record that appellee corporations were charged in accordance with defendant’s Exhibit A, based upon defendant’s Exhibit C, the rate schedule and that there was no other published rate schedule or regulation other than that contained in Exhibit C and as subsequently promulgated and published as set forth in Exhibits C, D, E, F, G.” (R-85-98) (Emphasis supplied).

“Evidence of any such policy or practice can be found nowhere in this record to support appellant’s statements that it had such a policy after repeal of Ordinance No. 55, . . . (See Appellee’s brief, page 14).

“Accordingly, we submit that the trial court did not have before it any evidence from which it could have made any Finding of Fact that the appellant City had any practice or policy other than that contained in published rate schedules.” (See Appellee’s brief, page 35).

To use the words of the Trial Judge, appellant will not “quibble” with appellee whether it wants to use the words “policy or practice”. (R-364). The policy and practice to which appellee and appellant have reference is that practice whereby the City of Anchorage has never permitted any consumer having two or more electrical utility meters to combine the same, adding the total kilowatt hours consumed and then applying this consumption to a rate schedule. The refusal of the City of Anchorage to so combine meters or to con-

junctively bill has at all times been in effect, irrespective of whether or not a particular consumer's meters were on the same building, located on different buildings on the same tract of land, within the same general power schedule, or otherwise. Appellant made the statement before and will make it again that the evidence in this trial showed that since 1925 there has never been an instance where the City of Anchorage combined two or more meter readings under any circumstances, including the circumstances of appellee. There is absolutely no testimony in the record to contradict this. The consistent policy and practice is supported by the record in many places.

It is submitted that the practice of the City from 1925 until August of 1949 is shown by Ordinance 55 (Exhibit 10). As noted in the record on page 319 and on page 2 of Appellee's brief, Ordinance 55 was repealed during the time that attorney for one appellee, John Hellenthal, was attorney for the appellant. The City of Anchorage, in the process of codification of its ordinances, repealed Ordinance 55 and no ordinance was ever enacted to replace the same.

The code was "enacted by the City Council and effective chapter by chapter from January 1948 until April, 1950; enacted as an entire code April 12, 1950." (See the City of Anchorage General Code over the signature of John S. Hellenthal, Attorney, certified by the City Clerk on the 12th day of June, 1950.

Chronologically, the evidence of policy of the City of Anchorage in refusing to combine meter readings is as follows:

1. 1925 to August 1949 (Evidence of Policy and Practice).

Ordinance 55 (Exhibit I) prevented combined or conjunctive billing (unless for the convenience of the Utility).

2. 1946 to date of trial (Evidence of Policy and Practice).

The pertinent testimony commences on page 363 of the record. Witness Nichols was the City Comptroller (R-363), having charge of billing for the City Electrical Utilities. He has been in charge of the billing department for the City Electrical Utility since 1950 and has personal knowledge of all billing practices since that time (R-363). Mr. Nichols testified:

“It has been our practice to rate each meter individually. By that I mean whether a customer has one or twenty meters each meter is rated individually. We start at the top rate and work down again rating them through regardless of location.” (R-365).

(Starting at the top and working down has reference to applying a given number of kilowatt hours to a declining rate schedule.) In 1946, 1947, 1948, 1949, 1950 and 1951 there were two-story apartment buildings located in the City of Anchorage served by the City Utility under exactly the same physical circumstances as appellee. These were the Alaska Housing Authority projects in the City of Anchorage (R-365). There were approximately sixteen apartment units in each building, (R-365) and each apartment unit had a separate *electrical* meter (R-366). There was also one meter for each of the apartment buildings for “house” power consumed (R-366). Mr. Nichols testified as follows:

“Q. And what was the policy in regard to billing of the house meters?

A. Those units were erected in 1946 and as far as I can determine from the meter books they have been rated individually since that time.

Q. Now, since you came with the City, are you able to say they definitely have been metered individually?

A. Yes.

Q. What do you mean so far as you are able to determine from the meter books?

A. Our billing record is a meter book which contains the location and the meter readers put in the number and subsequent readings on that. Each one is rated as individual meters.

Q. Then, according to the City records, as to billing, the same policy has been followed since your employment by the City, at least it was followed in the case of Alaska Housing Authority units prior to your coming and up to 1946, is that correct?

A. Yes, sir.” (R-366).

To establish the policy of the city as being uniform despite whether the same was commercial or domestic service the following portions of the record are submitted:

“Q. Mr. Nichols, a person coming under domestic services, how many persons do you have that have multiple meters?

A. Under domestic services?

Q. Excuse me, under commercial services first?

A. Under commercial services we have 90 and that varies from 2 to 17 meters per establishment

and those establishments are situated either under one roof or on adjoining pieces of property and limited to 3 city lots in size.

Q. And how about domestic services?

A. Domestic services, there are 95 having from 2 to 11 meters, under the same geographical conditions.

Q. And of other classifications there would be 15 or 18 more persons?

A. 19.

Q. 19 more persons that would have combined meters?

A. Yes." (R-368-9).

There are in all approximately 600 customers of the City Electrical Utility which have multiple meters (R-369).

"Q. *And on any of those are the meter readings combined for the purposes of computing the applicable rate?*

A. *No sir.*" (R.-369) (Emphasis supplied).

See also the *excellent* cross-examination of Nichols (R-370-372).

3. November 10, 1951 (Evidence of Policy and Practice).

See Exhibit "K" being the council minutes for the City of Anchorage of that date. Said minutes state:

"Mr. John Hellenthal representing the Anchorage Rental Service requested that the Council consider the matter of combined reading of electrical energy for the 33 buildings on Government Hill known as *Richardson Vista and Panoramic View Housing Projects*. At the present time each building is billed for electrical energy on a unit basis

for each building, whereby considerable savings could be realized if electrical consumption for all the buildings were totaled and billed. . . .

“It was determined that the request, if granted, *would alter the established policy of billing electrical energy* for each individual building and thereby also affect many others who own more than one building in the community and are being billed on a separate unit basis. . . .

“It was moved by Hoppin and seconded by Ax-ford that the City Manager make a study of the number of large electrical consumers who would be affected, together with the loss in revenue if the method of electric billing as requested by the Anchorage Rental Service is put into effect. All voted in the affirmative.” (Emphasis added).

4. 1954 (Evidence of Policy and Practice).

According to plaintiff’s witness Heman B. Sarno who in 1954 acquired an interest in some of the properties here under discussion, he had during that year conversations with a Mr. McKinley of the City Electrical Department (R-239).

“Q. Now, when you went to Mr. McKinley and the City people and asked for combined billing, what did they tell you about that?

A. They said they wouldn’t do it.

Q. They said they had a policy against it, didn’t they?

A. No, they never. I never heard the word ‘policy’ mentioned, ever. . . .” (R-258).

“Q. Didn’t Mr. McKinley say, ‘Our policy is not to combine. If we combined them for you we would have to combine them for everybody else’?

A. Mr. Rader, the policy was never mentioned as such. I assume the way he said it that it was their policy, apparently, but the word 'policy' was never mentioned. He said, *'We can't do it for you because we would have to do it for everybody else.'*'' (R-259) (Emphasis added).

It is submitted that the record is replete with evidence of a continuing practice and policy by the City of Anchorage from 1925 up until the time of this trial. It is submitted that the District Judge recognized this to be a fact when he stated:

"The City contends that the installation and maintenance of a separate service drop and meter at each building warrant the classification made and *points to the fact that all identical housing projects, as well as more than 200 multimeter consumers within its corporate limits, are similarly dealt with.*" (Opinion of the District Judge, R-45) (Emphasis supplied).

The second half of the sentence is in effect a finding of fact of City policy and practice. See also the opinion of the District Judge (R-48):

". . . and plaintiffs argue that in the absence of such a rule or regulation *the practice* referred to was unauthorized. . ." (Emphasis supplied).

". . . (2) if so, whether *the practice* conflicts with Schedule (C). . ." (Emphasis supplied).

". . . it follows that the City was not required to make *such a practice* the subject of a rule or regulation" (R-48) (Emphasis supplied).

It is submitted that the record supports a finding of policy and uniform practice and the Trial Judge rec-

ognized the same, appellee's brief to the contrary, notwithstanding.

Appellees started this lawsuit arguing discrimination, i.e., non-uniformity in billing procedures. Their proof failed and the Trial Judge did not find any discrimination. Appellees say there is no evidence of uniform practice and policy, yet appellees could produce not *one* instance where the practice or policy was not uniform. If appellees could have produced such an instance, perhaps they could have thereby proved their allegations of discrimination.

But they couldn't, didn't, and failed. All similar housing in the City of Anchorage was wired and billed precisely as were appellees' (R-207, 208, 209, 211 through 230, 365, 366, 368 through 373).

I.

CONTRACT AND ESTOPPEL THEORIES OF APPELLEE ARE NOT PROPERLY BEFORE THIS COURT.

Appellee in its statement of facts, on page 7 of its brief, sets out its contentions. These contentions are that the power used by the house meter should be combined and the declining rate applied thereto in accordance with (a) the published rate schedule, and (b) "*the prior agreement of the City that it would do so. . .*" Appellee then proceeds to recite testimony (pp. 10, 11, 12, 13 of appellee's brief) of one Mrs. Hall who testified for appellee. Mrs. Hall spent a good deal of time in the trial attempting to create an *agreement* between appellees and appellant, whereby appellant

agreed to combine meter readings (*one consumer and one establishment*, see pages 10, 11 of appellee's brief, quoting testimony of Mrs. Hall).

Appellee in its brief again makes reference to a supposed agreement with the City of Anchorage, on page 11, as follows:

"It was at once apparent that appellant City had not only abrogated the *agreement* it had heretofore made with reference to combined billing but had completely disregarded its own published rate schedule" (Emphasis supplied).

On page 13 of appellee's brief is a discussion also of "their agreement".

Appellee in its summarized undisputed facts, No. 4 on page 21 (which "facts" incidentally are not "undisputed") states:

"*Agreement* of qualified and authorized City officials prior to commencement of operation of project to treat appellee as one customer (but one bond required to guarantee payment by appellee for house power used by it rather than 14 bonds which would be the case if appellant City treated each of the 14 buildings as single 'ownerships' . . ."

Again, on page 22 of appellee's brief, in its further "undisputed" facts statement, appellee characterizes its law suit as being:

"Commencement of suit in equity for injunction to enjoin City from continuing billing practice not in accord with published rate schedule, and in violation of published *contract* and *separate agreement* to prevent discrimination against plaintiffs and to recover the difference between

the rate paid under protest and the most favorable rate as published'' (Emphasis supplied).

Throughout appellee's arguments frequent reference is made to the "agreement" with the City of Anchorage. See appellee's brief, on page 36, where appellee states:

"This argument is very difficult to follow because all appellee corporations ask is that they be charged in accordance with the published rate schedule and in accordance with the *agreement* which was made with appellee corporations by the City's representatives at the time of the commencement of occupation of these projects."

See also appellee's brief, page 19, "meeting of the minds." The appellee then states, on page 14 of his brief:

"No evidence was introduced by the appellant City to contradict the testimony of Mrs. Hall. Neither Mr. Sharp who was then City Manager, or Mason Lazelle, who was then the City Electrical Superintendent, was called as a witness by the City, although the City had been fully aware for months of the pendency of this action."

It is submitted that appellees know quite well why appellant did not answer the testimony introduced by appellee concerning an "agreement" with prior city officials. *Appellee did not plead any such agreement or contract. Appellees did not plead estoppel* but yet appellees brought into the courtroom, at the time of trial, a woman purportedly repeating conversations with city officials approximately four years prior. It

must also be noted that the record shows that the persons with whom Mrs. Hall had conversations were no longer with the City of Anchorage. The impossibility of meeting such evidence on short notice is apparent. Such evidence would certainly have been met, however, had appellees pleaded the same. Appellees did not plead the same for reasons best known to themselves.

This Court may have cause to wonder why Judge Folta did not take into consideration these so-called "admitted agreements" which are urged upon this Court by appellee. Judge Folta did not dignify this claimed agreement by his opinion other than to say:

"It appears . . . the plaintiffs *discussed* the matter of rates with some of the officials of the City with the view of obtaining the benefit of conjunctive billing" (R-46) (Emphasis supplied).

If this Court is interested in the reliability of the testimony of Mrs. Hall on which this agreement, so to speak, is largely predicated appellant would merely refer to the record. Mrs. Hall's testimony is full of inconsistencies, impossibilities, fantasies, and evasive answering of questions put to her. Appellant does not see the value in analyzing in detail Mrs. Hall's testimony for this Court for the reason it appears to appellant to be obvious that appellees cannot recover on the same, because of their failure to plead the basis for any such recovery, and the further fact that the District Judge refused to dignify or find any such agreement as a fact.

Perhaps appellee has cited this testimony in an effort to create "equities" of some type or another.

hoping to create an illusion of unfairness on behalf of the City.

This inference of unfairness is absolutely unjustified in the record. What actually happened was that construction of the buildings was commenced in 1949 and the apartment units were initially occupied, or occupancy commenced in *July* of 1951 (R-175). Mrs. Hall did not even go to the City Manager relative to this one customer proposition and "agreement" until "the early part of August" of 1951 (R-165, R-189).

When Mrs. Hall talked to the City Manager the meter panels had already been placed (R-189). There was already a spot on these panels for appellee's house meter (Appellee's brief, page 6).

Mrs. Hall refers to letters guaranteeing utility services from the City of Anchorage (R-181). Appellant demanded that the same be produced (R-184). The record will show that they were never produced. Mrs. Hall referred to corporate minutes (R-164) from which she had "refreshed" her recollection. Appellees could not produce these. Mrs. Hall also refers to conferences in which minutes were taken (R-195-197). A demand was immediately made to produce the minutes of those conferences (R-185-197).

Mrs. Hall suddenly decided, on redirect examination, after the notice to produce on cross-examination, that maybe she didn't have any such minutes (R-234-235), although Mrs. Hall said when she left the employ of appellee corporation in 1954 she had a firm recollection of the minutes (R-196-197) taken in 1951, and

could not testify as to the National Electrical Code without checking the same (R-197).

It appears that no "minutes" were ever actually taken but that there were only "work check lists" (R-235) which customarily were not preserved.

The testimony of Mrs. Hall was erroneous in some instances and subject to suspicion in all instances.

II.

THE ARGUMENTS OF APPELLEE IN ANSWER TO APPELLANT FAIL TO MEET APPELLANT'S POINTS WITH EITHER LOGIC OR AUTHORITY.

(A) Appellee fails to meet the Appellant's argument and showing of a consistent Practice and Policy (Page 30, Appellee's Brief).

Appellee commences its arguments in answer to appellant on page 29 of its brief. Its first answer to appellant concerns the failure of appellant to have a policy or practice, and appellee quibbles with the findings of the judge concerning the practice or policy of the city relative to conjunctive billing (See previous argument). Appellant will not repeat the previous argument but it will suffice to say that appellee, in the lower court, attempted to prove discrimination, in an attempt to prove some variance in the treatment of consumers by the City of Anchorage with reference to its billing practices and procedures.

The appellees could find no such instance and submitted no proof of any such instance. Perhaps it was an overabundance of caution which caused the appel-

lant to take the affirmative in this matter when, at the conclusion of the appellees' case, no variance had been shown. Stated in a somewhat different manner, it was impossible for the appellees to negate any such policy or practice and show discrimination; therefore, the appellant showed positively there were no variances in the practices of the City.

Appellee insists that the District Court did not find any policy to be a fact. In a previous argument in this brief the appellant has pointed out to the Court the references in the opinion of Judge Folta, indicating a finding of fact on this precise point, and will now only say, in addition, the failure of the judge to find any discrimination or variance is persuasive that the policy existed and was followed consistently.

(B) Appellee fails to meet Appellant's argument to the effect that conjunctive billing will not be permitted unless provision is made in the Rate Schedule for the same (Page 35, Appellee's Brief).

Appellee cites, on page 18 of its Brief, the testimony of its witness Rutherford to the effect that in his *opinion* there was nothing published in the Anchorage rate schedule which would *prohibit* the conjunctive and combined billing that appellees desire. Mr. Rutherford's opinion of the right of appellees to have conjunctive billing under the rate schedule of appellant invaded, somewhat, the province of the Court. (Note: Rutherford was *not* qualified as a rate expert, R-280). That is the precise question under litigation.

As cited in appellant's opening brief (and rebutted in Appellee's brief, p. 35, et seq.) the law is

to the effect that conjunctive billing will not be permitted unless affirmatively provided in the schedules. The fact that no reference is made to conjunctive billing in a particular schedule is of itself the best evidence the practice is not permitted. Actually, what appellees seek is a rate which is not provided by the rate schedule. They seek in effect a *new, retroactive rate* and argue they are entitled to a *new rate* not specified in the rate schedule because the *new rate* is not expressly prohibited although the consistent practice and policy of the City has been to prohibit the same. (Conjunctive or combined billing would create a *new rate*. See R-298, 299, 300, 301, 302, 411).

(C) Appellee fails to meet Appellant's argument that there will be no judicial interference with a Rate Schedule unless the same is unreasonable or discriminatory (See page 39, Appellee's Brief).

Appellees insist that a proper answer for argument No. 3 of appellant is to call the same a windmill. Appellee meets with neither logic nor authority the arguments and problems raised by appellant. Therefore, presumably appellant's argument No. 3 stands as it originally did.

The District Judge found apparently that *a consumer is entitled to multiple metering or conjunctive billing except where multiple meters were installed at the request of the consumer.*

This proposition does not appear in the published rate schedule. It is a "conjunctive billing order" and is, pure and simple, judicial rate making.

The practice of combined or conjunctive billing *must* be defined. Even with precise definition this practice creates discrimination. See *Realty Supervision Company v. Edison Electric*, 1917B, P.U.R., at page 962, and *Re Combined Billing for Electric Service*, 54 P.U.R. (N.S.) 295-306. If it is to apply to one, it must apply to all others similarly situated. Appellant still has many questions in regard to this billing rider should this Court see fit to uphold the new rate promulgated by the District Court:

(1) Relative to the request for single or multiple meters by the consumer:

(a) Does the request have to be made before the utility constructs its distribution system to a new area?

(b) If a distribution system has already been constructed before any request, does the utility have to alter its facilities to meet the request?

(c) Who pays for any alteration necessary to meet the request?

(d) If the consumer originally requests multiple meters and later requests a single meter, does the utility have to comply with the last request?

(2) Is combined billing limited to meters in different buildings on contiguous properties?

(3) Does it make any difference that two buildings located on the same tract may be one-half mile apart, with the utility forced to run a line to each of said buildings and put a meter in each of said buildings?

(4) Does the fact of intervening streets make any difference?

(5) Does the tract have to be occupied by one consumer only?

(6) Does it make any difference if the tracts have been subdivided?

(7) If appellees lease or sell one-half of their buildings to a third party, does the fact they sold these buildings justify the City in then breaking the consumption in half, thereby receiving more revenue for precisely the same service as was rendered before and with absolutely no change in electrical facilities?

See a typical conjunctional billing rider and some similar problems under same in the case of *Re New York Edison Co., et al.*, 10 P.U.R. (N.S.) page 244.

The new rate created by the District Judge which provides for conjunctive billing, when the meters were not installed at the request of the consumer leads us directly into the next argument which is to the effect the District Judge did not find the "*necessary fact*" under the rate structure created by the District Judge. *That is, the District Judge did not find that appellees did or did not request multiple meters.*

(D) Appellee fails to meet Appellant's argument relative to the sufficiency of Findings of Fact and Conclusions of Law of the Memorandum Opinion.

(1) Measure of Damages.

Appellants contend in their Argument No. 4 that the District Judge found no measure of damages.

Appellee attempts to answer this, on page 40, by arguing that:

“The record at pages 89 through 94 discloses the fact that prior to the commencement of taking testimony it was agreed by counsel for appellant City that if appellees were entitled to recover they would be entitled to the difference between the amounts which they had paid under protest and the amount which they would have been required to pay had the proper rate been applied in the proper manner to the operations of appellee corporations.”

Appellant did prepare Exhibit “A” and Exhibit “B” as computations of the electrical energy consumed, the amount billed with individual meter readings and the amount that would have been billed had the meter readings been combined. The purpose of these exhibits is set out in the record:

“Mr. Rader. ‘If it please the court, now in both of these exhibits (A & B) I want to make it clear that we are not agreeing that either corporation is entitled to the rates which they contend, but we have for the convenience of the court and for the convenience of the litigants attempted to include them all in one exhibit so as to show the difference. . . .’” (R-87). (Emphasis and parentheses supplied.)

“Mr. Rader. ‘And it also shows the difference in what those charges would have been had all the house meters been combined and read as one meter on the consumption indicated month by month. In other words, I think it indicates a difference in the theories of billing . . .’”.

“Mr. Rader. ‘That is correct. We have prepared the exhibits. We tried to prepare what they did pay and we tried to follow through their theory consistently as to what they should pay and make the difference which put it all at the court’s fingertips. Right there is what we tried to do with these Exhibits A and B.’ ” (R-91.)

Appellant does not believe it admitted that appellees, if entitled to recover, would be entitled to recover the *difference* in what they paid under the city’s theory and what they claim they would have paid with a conjunctive billing rate. The exhibits (A & B) were submitted to the court and were prepared by appellant for the convenience of the court and litigants. If appellees are entitled to recover anything, the difference in the established rate and the rate appellees claim is an “evidentiary fact” to be considered by the court in determining damages. Justice Cardozo, in the case of *Interstate Commerce Commission v. United States ex rel. Campbell* (1933), 289 U.S. 385, 389, 390, stated that the difference in rates is only an “evidentiary fact” and is not the measure of damages in a discrimination case. (For a full discussion of this case see appellant’s opening brief, page 47.)

(2) Injunctive Relief.

The District Court failed to find any right in appellee to injunctive relief. In this regard merely see the opinion of the District Judge.

(3) Request for Multiple Meters.

The District Judge failed to find whether or not "multiple meters were installed at the request of the consumer." (R-49).

Appellant argued in its opening brief, on pages 44 and 45, as follows:

"In construing the language of Judge Folta's Memorandum Opinion most favorably to Appellees (R-45, 46, 47, 48, and 49), it is impossible to determine the damages or reparation, if any, to which Appellees are entitled. Judge Folta did find that although the City's practice was not unreasonable, yet the City's definition of establishment as being 'one point variety' (one meter with one point of delivery) was in conflict with Schedule "C" except where multiple meters were installed at the request of the consumer (R-48, 49). *As heretofore noted, this language actually does not entitle the Appellees to any judgment whatsoever inasmuch as there was no finding made by the District Judge as to whether or not the multiple meters were installed at the request of the consumer in the instant litigation, although it appears that after installation Appellees requested a change.*" (Emphasis added.)

An answer to the foregoing is not to be found in appellee's brief. It is submitted that there was no finding relative to this question. It is also submitted that a careful reading of the record would indicate the City of Anchorage appellant actually did install the *multiple* meters at the *request* of the appellees.

Exhibits 6, 7, and 8 are photographs of typical meterboards of the 22, 16 and 12 unit buildings. See appellee's brief, page 6.

“The house meter is shown on the lower left hand corner of the photograph of the 22-meter board and the 12-unit meter board and is the second meter from the right on the 16-unit meter board.”

It is submitted that on the record these meter boards *had already been installed* by appellees in their buildings with an individual meter for the house current in each of the buildings *before any communication* with the city officials relative to combined or conjunctive meter readings.

Testimony of Mrs. Hall:

“Q. When did you first talk to Mr. Sharp? (The then City Manager.)

A. I met Mr. Sharp within two days after arrival in Anchorage which was in the early part of April.

Q. I think you stated on direct examination the first time you talked to him was in August, 1951 about rates.

A. The actual speech about rates that I can make a definite reference to was in August, 1951.

Q. At that time some of the buildings were already occupied, weren't they? (Note, See R-175, Initial occupancy in July, 1951.)

A. The buildings were occupied.

Q. So the wiring was completed on those.

A. In August, yes sir, on a portion of the buildings.

Q. And it was completed on a good many of the others, the wiring?

A. It depends on what part of the wiring you are referring to. The last installation was meters. *The panels had been in prior to that time.*” (R-189.) (Emphasis and parentheses supplied.)

It is submitted that appellees constructed their buildings, installed meter panels, each of which meter panels had a meter base for every apartment and *also a meter base for the house power consumed*. The City of Anchorage put a meter on each meter base constructed by appellees. Under these circumstances at whose request were the house meters installed? It would appear that if appellees put in their wiring and installed their meter panels with a separate meter for their house power in each building, and subsequently the meter was installed on that meter base, it is fair to say separate meters were installed on the request of appellees.

This leads us back to appellant's earlier argument that the District Judge acted beyond his judicial capacity when he, in effect, rewrote the rate schedule and created terms and conditions which had never existed before. However, if the opinion is to stand, then it is suggested that the City of Anchorage on this record is entitled to a judgment.

It must be admitted there was some discussion with city officials concerning electrical supply of the properties of appellees back in 1949; however, there was absolutely nothing any more definite than assurance by the City that it would "cooperate" with the appellees in supplying electrical service to them (R-340). There was no mention of multiple meters or conjunctive billing.

(E) Appellant's argument relative to its right to trial by jury.

Under every theory of the law the appellants were entitled to a trial by jury. Appellees attempt to say

that because injunctive relief was requested there was no right to a trial by jury. It is suggested that although injunctive relief was requested the District Judge found no basis for granting the same, and did not, in his Memorandum of Opinion, lay the foundation for the same. Injunctive relief was not the essence of appellees' claims.

III.

APPELLEES' ARGUMENTS INDICATING DISCRIMINATION AND "INCREMENTAL COST" THEORY OF RATE STRUCTURES ARE NOT WELL FOUNDED IN THE RECORD OR IN THE MEMORANDUM OPINION FROM WHICH THIS APPEAL IS TAKEN.

A) Discrimination.

Appellee in regard to discrimination cited certain portions of the testimony on page 20 of its brief, which is to the effect that there is no difference between appellee's apartment buildings and the 1200 L Street Apartments and the Mt. McKinley Apartments. Substantially, *each* of appellee's buildings is like *each* of the 1200 L Street and the Mt. McKinley apartment buildings. Each has its own individual meter and each has separate meters for the tenants of the property. There is only *one* 1200 L Street apartment building and there is only *one* Mt. McKinley Apartment building. They are treated precisely and exactly as appellee and wired in the same manner as are appellee's buildings. Appellee cites evidence to the effect that there is no basic difference in the buildings. That is correct. Where the error creeps in is that for the *one* Mt. McKinley building the City

of Anchorage supplies *one* meter and *one* service drop for *one customer* and applies the rate schedule *once*. In the case of appellees the City of Anchorage installed, supplies, maintains and is responsible for a distribution system that runs to 33 separate buildings with 33 service drops, and 33 individual points of delivery spread over an area of approximately 40 acres, and applies the rate schedule 33 times (i.e., once for each point of delivery).

That is the difference. The Trial Court found no discrimination.

(B) Incremental Costs.

Appellee seeks to influence this Court by an "incremental cost" argument. Appellee argues that inasmuch as the additional cost to the electrical utility system to supply appellees is very small, they should, therefore, in effect be given a new conjunctive or combined billing rate which would reduce appellees' costs. Appellee also recites testimony which indicates the present electrical distribution system is the simplest and best.

We take no issue with the fact that the present distribution system is the simplest and the best. We believe that it is. However, the fact remains that the City of Anchorage is supplying appellees at 33 different points of delivery spread over 40 acres of land. If appellees are *not* going to help pay for that distribution system as any other customer of the City of Anchorage, then certainly, from the appellant's point of view (the electrical utility), it should no longer

serve 33 points over 40 acres, but should rather serve only *one* point and force the appellees to build their own distribution system within their own project (R-313, 314). This, of course, would cost the appellees a substantial amount of money. It would also not be the *simplest* and *best way* of supplying electrical energy to appellees. It is submitted that in practically all circumstances one distribution system supplying all consumers to each point of delivery and use is the simplest and best type of distribution system. Rate structures are not predicated on incremental costs but rather on average costs (R-386, 387, 388). However, appellee's incremental costs propositions, which are indicated indirectly by its brief, will avail it nothing for the reason that the District Judge, in his Memorandum Opinion, refused to dignify appellee's contention and omits any reference to the same.

IV.

THE AUTHORITY CITED BY APPELLEE IN ITS ARGUMENT IN SUPPORT OF JUDGMENT IS NOT IN POINT AND CAN BE DISTINGUISHED.

Appellee commences its argument in support of judgment on page 22 of its brief and concludes the same on page 29 of its brief. The first case which appellee cites in reference to the merits of the problems of conjunctive billing is *Florence Laundry Company v. Missoula Light & Power Company*, 1925B *Public Utilities Reports*, page 690. Appellee states the *Florence* case is "almost exactly in point with the

facts of this case.” (Appellee’s brief, p. 24). We do not agree. The *Florence* case involved the supplying of water by a public utility. Florence Laundry Company was originally supplied through one meter and through one service connection. The laundry acquired a second building across an alley, the water supply to which was connected to their first and original building. With the additional use the service connection existing was unsatisfactory, therefore, a second service connection was made.

“The waters from these two sources were actually *mingled* in water storage tanks in use in the laundry’s business.” (Page 692.) (Emphasis is supplied.)

In the case at bar the supply of electricity to each of appellees’ 33 points over 40 acres is not mingled, so to speak, inasmuch as at each of the 33 points of delivery there is a completely separate and individual distribution and use. The court also noted in the *Florence* case that:

“In this instance all the water was furnished to one corporation, to-wit, the Florence Laundry Company, for identical use, to-wit, laundry purposes, *all under the same roof or at least at points so near together as to defy distinction* for and on account of distance and cost of service . . .” (Page 694.) (Emphasis supplied.)

“There is no distinction between the two services or between the purposes of the two meters, save the *accidental circumstances* of installation some years apart and at a short distance apart . . .”

“Indeed, it is evident that the company has *combined the meter readings in other businesses* where differences in points of installation, etc., were and are no more marked than in this case.” (Page 694.) (Emphasis supplied.)

Further distinctions in the *Florence* case and in the case at bar are manifest.

(a) In the case at bar the points of delivery are spread over forty acres and are not “under the same roof, or, at least, at points so near together as to defy distinction . . .”

(b) The installation of the distribution system to appellees’ 33 points of delivery over 40 acres was not an “accidental circumstance of installation.”

(c) In the *Florence* case the company had combined the meter readings in other instances under similar circumstances. In the case at bar there is absolutely no evidence in the record that appellant ever combined meter readings for any person. *In the Florence case the Commission actually found discrimination!* In the case at bar there is a complete absence of a showing of any discrimination. The Commission cited with approval *Supervision Company v. Public Service Electric Company* (N.J.) P.U.R. 1922 D, 555, and said that:

“The New Jersey Commission held that a company owning a group of nineteen stores, a detached building and a garage *is not entitled to a combined rate*, when the plan of the building structures indicate separate and distinct stores, with separate deliveries and with nothing in com-

mon except the fact that they are under a continuous roof.” (Page 694.) (Emphasis supplied.)

By analogy in the case at bar we have a group of 33 apartment houses (instead of stores), a detached building (the office of one appellee) and the plan of the building structures indicates separate and distinct apartment buildings, with separate deliveries, (Exhibit “H”), and with *not even a common roof*. This appears to be authority supporting appellant, not appellee, for in that case combined billing was refused, even with the additional fact of a common roof.

The appellees next cite the case of *Esmerelda Power Company v. Nevada*, P.U.R. 1920E, 388. The *Esmerelda* case holds that the Esmerelda Power Company is entitled to the same rate as the Tonopah company *similarly situated* (p. 390). The Commission also found that:

“The synchronous motor generator set of the Esmerelda Power Company is, at this time, an asset of value to the Nevada California Power Company in maintaining satisfactory service. The *concession in rates*, and allowance of the electric current for operating the set, are made in recognition of this view.” (p. 391.) (Emphasis supplied.)

This decision leaves much to be desired in the way of statement of pertinent facts. It is impossible to say whether the Esmerelda Power Company was permitted to combine two meter readings because of the necessity for being on the same rate as the Tonopah Extension Mining Company or whether the “conces-

ion in rates" refers to the combined metering or to some other issue in the case. The decision does not state the physical location of the meters it permits to be combined. It does not state whether or not such a practice has been permitted in the past by the utility company or whether the utility company had any rule or regulation concerning the same. The reported decision does not even set out the rate schedules under discussion nor appear to give the essential wording of the same. *It is impossible for appellee to say that it is within the facts of this decision when the facts are not given in the decision itself.*

Appellee next cites (p. 26) *Colonial Gardens Corporation v. Philadelphia Suburban Water Company* (71 P.U.R. (N.S.) 497 and appealed 64 A. (2d) 500). This case has already been distinguished by appellant on pages 31 and 32 of appellant's opening brief. Briefly, the *Colonial Gardens* case is distinguished by Tariff Rule No. 17 which was being construed and also by the fact that the distribution facilities on the consumer's property were installed, maintained and owned by the consumer. In the instant litigation the appellees, the consumers, have constructed absolutely no system on their own property to connect their facilities, but rather left this responsibility and expense to the appellant's utility.

Appellee cites the case of *Bilton Machine Tool Company v. United Illuminating Co.* (148 A. 337, p. 27 of Appellee's brief), and states that the same is:

"... strong supporting authority for plaintiff's position here."

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Appellee cites the case of *Bilton Machine Tool Company v. United Illuminating Co.* (148 A. 337, p. 27 of Appellee's brief), and states that the same is:

"... strong supporting authority for plaintiff's position here."

It is submitted that this case is not authority for appellee unless appellee can show *discrimination*. The court in the *Bilton Tool Company* case said:

“Consumers of the defendant of the same class and *similarly situated* with the plaintiff as to equipment were charged upon the basis of a single sliding scale or kilowatt hour and upon a totalized reading of the current consumed measured through the meters used.” (Page 339.)

And the court further said:

“If any corporation using the same power as plaintiff had used, had at this time applied to defendant for service, it would have received service at the current rates on a single sliding scale which would have been billed on one bill.” (Page 340.)

This case says nothing more and nothing less than if the utility company combines bills for one party they must do it for another. Obviously, it is manifestly discriminatory and unjust to refuse to combine meter readings for one customer and not for another similarly situated and the court so held. In the case at bar appellees were unable to submit to this court one instance or one case when combined billing or totalized billing or metering was permitted by the City of Anchorage, and the appellant City of Anchorage even went so far as to show that since 1925 there had been no such thing as combined metering or billing as a matter of uniform policy and practice.

The *Scovill Manufacturing Company* case (64 A. 218) (cited by appellee on page 28 of its brief) was a

case in which the consumer built, maintained and owned its own distribution system and possessed its own meters. None of these facts exist in the case at bar. Quite the contrary, in the case at bar the utility has the complete responsibility for all distribution systems bringing electrical energy to each of the appellees' 23 separate buildings and points of delivery.

Appellee Panoramic View has stated that the authorities submitted by appellant "are not in point and do not support its position." (Page 32, appellee's brief). Appellee then states that the case of *Land Title Bank & Trust Co. v. Penn Public Utility Commission*, 10 A. 2d 843, is not in point. This is somewhat odd inasmuch as in the lower court this case was cited by appellee Richardson Vista in a brief as authority for appellees.

CONCLUSION

Appellant's position is briefly stated in the opening paragraphs of this Brief in its "Introductory Restatement of the Case."

Appellant believes the opinion of the Trial Judge is basically in error.

The result of the decision is to upset a utility rate and compound the problems raised, by applying the same retroactively. If the new conjunctive billing rider created by the District Court and applied retroactively to 1951 in the instant case is applied retro-

actively to all others similarly situated (as it must be if discrimination is to be prevented) in the words of the District Judge, "disastrous consequences" may well result. If the new conjunctive billing rider were applied only to the future, then perhaps a rate increase per KWH could be made to compensate for loss of revenue resulting from conjunctive billing.

Whether a utility wants (a) *conjunctive* billing riders and an *increased* cost per KWH; or (b) *no conjunctive* billing riders and a *lower* cost per KWH with *both resulting in the same revenue* necessary to maintain the utility, is a matter for the utility to decide, (in this case a public body, the City Council), and not the Courts. *The equation* is thrown out of balance when a low cost per KWH is applied retroactively with a conjunctive billing rider.

The extent of the imbalance created in the necessary equation by conjunctive billing can probably only be determined by a technical rate analysis and continued litigation to determine who requested multiple or single meters, with the retroactive effect restricted only by the Statute of Limitations.

The problems created by the District Court decision are real. Appellants believe that this Court must look to the inevitable results of the same. The judicial system should not engage in rate-making and utility management. The City Council, a governmental unit, has said "no conjunctive billing." The decision of the City Council is admittedly reasonable. The legislative and executive branches of the governmental unit having jurisdiction have acted. Judicial inter-

vention is unnecessary, undesirable and not proper in the law.

The decision of the District Judge should be reversed.

Dated, Anchorage, Alaska,
September 10, 1956.

Respectfully submitted,

HARTLIEB, GROH & RADER,

By JOHN L. RADER,

Attorneys for Appellant.



No. 15,082

United States Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,

VS.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Appeal from the District Court for the
District of Alaska, Third Division.

PETITION OF THE APPELLEE,
RICHARDSON VISTA CORPORATION,
FOR A REHEARING.

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No. 15,082

**United States Court of Appeals
For the Ninth Circuit**

CITY OF ANCHORAGE, a Corporation,
Appellant,

vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
Appellees.

Appeal from the District Court for the
District of Alaska, Third Division.

PETITION OF THE APPELLEE,
RICHARDSON VISTA CORPORATION,
FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

The Appellee, Richardson Vista Corporation, petitions in the United States Court of Appeals for rehearing in this matter. The Court of Appeals, on February 21, 1957, reversed the District Court judgment and remanded the cause, with directions to enter judgment in favor of the Appellant, City of Anchorage.

The Court of Appeals must have mistakenly believed that Appellees were unscrupulously attempting to take advantage of an inadvertent oversight amounting to an implied repeal of an ordinance; otherwise it is difficult to understand why the court went to such lengths to define "establishment" in the manner in which it did. Petitioner therefore emphatically states, at the outset of this petition, that the Appellees are not sharpshooters attempting to take advantage of an unconscious mistake or error, but on the contrary have been fair, open, and aboveboard in their dealings with the City of Anchorage and want only the benefit of the clear, unambiguous tariff upon which they relied in 1949 and thereafter, making payments under clear, fully explained, protest when the City declined to classify them properly.

The following grounds for rehearing are urged by the petitioner, Richardson Vista Corporation:

POINT I.

APPELLATE COURT'S MAJOR PREMISE WAS IN ERROR, AS PRIOR ORDINANCE WAS NOT REPEALED INADVERTENTLY OR BY IMPLICATION, BUT WAS EXPRESSLY REPEALED, AND THAT FACT WAS BROUGHT FORCEFULLY TO THE ATTENTION OF THE COURT AND ALL PARTIES BEFORE TRIAL.

The case involves the construction of an electricity rate tariff published by the City of Anchorage. In its opinion, the Court of Appeals was under the erroneous impression that City Ordinance No. 55 (Ex. I), which dealt with combining the readings of separate

meters (Sec. 24 of Ord. 55 or Ex. I), had been repealed by implication rather than expressly, and that the repeal was almost inadvertent.

The Court of Appeals, at Page 5, states: "Apparently, all the parties thought Ordinance No. 55 (original rate structure, rules and regulations adopted by the City in 1925 and repealed by implication by the adoption of Ordinance 283 in 1949) was still in effect". [Note that the Appellate Court is further mistaken: Ord. 55 or Ex. I did not establish any rate structure or contain any rules and regulations.]

Again, at the top of Page 6, in summarizing Judge Folta's opinion, the Court of Appeals states that the provisions of Ordinance No. 55 "were inadvertently repealed", and at Page 8 the court refers again to the repeal of the ordinance "by implication" and to the "repealing effect of Ordinance No. 283".

There was nothing inadvertent about the repeal of the applicable provisions of Ordinance 55. Section A-6 of Ordinance 283 (Exhibit 10) states:

"A-6 repeal. The following ordinances are hereby repealed: . . .

(a) . . .

(b) Sections 7 to 29 inclusive of Ordinance #55, dated 2 September, 1925". (See R. 356 *et seq.*)

(c) . . ."

The title of Ordinance 283 likewise refers to: "repealing . . . Sections 7 to 29 inclusive, of Ordinance No. 55."

As for the belief of the Court of Appeals that all the parties thought Ordinance 55 was still in effect, the following occurred at the pre-trial conference in District Court (R. 127, 128):

“The Court. You mean it’s some ordinance that contains these rules and regulations? Is that what you offer?

Mr. Rader. Yes.

The Court. It will be admitted in evidence. I don’t know why you should quibble over that.

Mr. Hellenthal. I know it was repealed. That is why I am quibbling over it. I know Ordinance 55 was repealed in 1949, if that is what it is. I haven’t seen it, but I strongly suspect it is Ordinance 55.

Mr. Rader. If it please the Court, I meant to say, if I didn’t say, that (it) should be offered for identification because I know there will be an argument as to its repeal and whether or not it is still effective.”

Judge Folta then stated:

“There is no use in marking it for identification. It will be marked as an Exhibit just as any other exhibit in the case. Even though it was repealed, it probably would apply to at least part of the period.” [The trial judge was, of course, mistaken in this belief.]

The court’s finding of a long-term continuing policy is predicated on an implied or inadvertent repeal of a portion of Ordinance 55. It cannot be otherwise. If after an express repeal, the council can conceal its subsequent mistakes through a unilateral declaration of “policy” manifest injustice would result, as it has here.

When it becomes apparent that the repeal of applicable sections of Ordinance 55 was express there is no need for discussing "policy". The sole remaining question is—Does petitioner fall within the applicable tariff, or Schedule C? Thus, the appellate court would not have labored over the matter of the existence or non-existence of a policy had it not made the initial error.

POINT II.

APPELLATE COURT WAS MISTAKEN IN ASSUMING THE EXISTENCE OF A POLICY PROHIBITING COMBINED BILLING.

The Court of Appeals, in its opinion, assumes that not permitting the combining of meter readings for common areas at petitioner's apartment project was a matter of long-standing policy on the part of the City of Anchorage.

The only actual relevance of Ordinance 55 to the case is to explain that the practice which the City had followed from 1925 until 1949 was not a matter of policy, but merely compliance with City law. The Court of Appeals, in its opinion at Page 8, said, "to overcome this established policy, there should be some definite proof of the City's intention to depart therefrom"; and at Page 16, the Court of Appeals said, "this interpretation followed the practice of many years . . ."

Actually, the pertinent section of Ordinance 55 was repealed on August 24, 1949 (R. 356). A few weeks

later, ground was broken for the construction of petitioner's housing project, and in August of 1951 the first tenants occupied apartments (R. 189). The following month petitioner was billed by the City for the electricity consumed in the common areas of petitioner's apartment buildings. Petitioner immediately protested to the City, and when its protest was denied, it filed this action against the City to compel compliance with the published tariff.

The Court of Appeals, in rendering its decision, had not been enlightened of the fact that only 23 months—and not 26 years—had gone by between the repeal of most of Ordinance 55 and the commencement of petitioner's use of electricity. The record is devoid of any evidence whatsoever of a City policy being established during that 23-month period. In fact, it would have been impossible for such a policy to have been established other than by ordinance or regulation, since petitioner's was the first apartment project to be energized in the City of Anchorage during this period. The only similar project in Anchorage had been energized in 1946, before the repeal of the prohibition contained in Ordinance 55 (R. 366).

In summary, there was no city policy prohibiting combined billing because there was no opportunity to establish any policy until petitioner's apartment project was constructed.

POINT III.

**APPELLATE COURT SAYS CITY MANAGER FOR-
BADE COMBINED READING WHEN IN FACT MAN-
AGER ENCOURAGED PRACTICE.**

The Court of Appeals, in its decision, was under the misapprehension that the City Manager had interpreted the electrical tariff as forbidding combined meter readings. Opinion, Page 16: “. . . and in fact was the interpretation of the council speaking through its agent, the City Manager”.

Actually, the City Manager, Mr. Sharp, according to all the evidence, gave just a contrary interpretation, “I was assured by Mr. Sharp that we would be treated as one customer . . .” (R. 203). Mr. Sharp was never produced as a witness to refute this testimony, nor was his absence explained by the City. Thus again the Appellate Court is mistaken in assuming that a prior policy existed.

POINT IV.

**COURT OF APPEALS OVERLOOKED ORDINANCE
PROVISION WHICH ESTABLISHED FIXED METHOD
FOR MAKING RULES AND REGULATIONS.**

The Court of Appeals held that rules, regulations, and practices supplementing and implementing the printed Schedule C were adopted informally by the City's construction of its own ordinance, “Whether it did this in council meeting or by acquiescence in the interpretation of the City Manager is immaterial”. (Op. Page 16). After the litigation was commenced, various city managers subsequent to Mr. Sharp, have

stated that either the National Electrical Safety Code, which was contained in the part of Ordinance 55 that was not repealed by Ordinance 283 (Ex. 10), or Schedule C prohibited petitioner's right to combined meter billings. The opinion of the Court of Appeals, however, ignores Chapter 1, Article 2, Section 206.1 of the Anchorage General Code which provides:

“Section 206. Publication of Rules and Regulations.

206.1. All rules and regulations made by any administrative officer subject to approval by the Council under the provisions of this Code shall be published either by one publication in a newspaper of general circulation in the City or by posting a copy thereof for ten days following their approval by the Council on the city bulletin board in the lobby of the City Hall.”

If a regulation could be made “by acquiescence”, the public would be faced with an impossible instability in City government. Rules and regulations could be passed by informal council action, and the only persons aware of them would be those in attendance. Laws would be subject to change by self-serving whim and caprice; stability in municipal government would disappear.

POINT V.

APPELLATE COURT ERRED IN DEFINING WORD "ESTABLISHMENT" AND PLACED ITSELF IN THE POSITION WHERE AN "INDUSTRIAL ESTABLISHMENT" COULD HAVE BUT ONE BUILDING. OVERWHELMING WEIGHT OF AUTHORITY IS CONTRARY TO COURT'S DECISION.

- (a) Appellate Court Ignored Its Own Prior Pronouncements Upon the Meaning of "Establishment".

The opinion of the court at Page 13 construes the word establishment "as meaning one one unit, and not all the units in an enterprise".

Only last year on March 1, 1956, however, in *Mitchell v. Bekins*, 231 Fed. 2d 25 at Page 27, this court speaking through Judge Chambers, stated:

"... It does not seem unreasonable to consider the five warehouses, generally in downtown Los Angeles within a limited radius, as one establishment.

Geography may well play quite a role. Probably, if the buildings were to be found scattered in San Diego, Los Angeles, Long Beach, Pasadena, Santa Barbara, Bakersfield, San Bernardino, and Riverside (with central control at one office) the trial court's conclusions would be clearly erroneous.

To this court, an important factor here is that if it were not for financial or capital problems and the necessity of using what one has, it would be quite feasible to conduct, and Bekins probably would conduct, the business of the five warehouses in one central warehouse under one roof."

Similarly, petitioner's apartment business could have been conducted and probably would have been

conducted under one roof had it not been for requirements of Federal Housing Authority and height limitations of the United States Army because of proximity to an airport (R. 163, 342).

In *Aragon v. Unemployment Compensation Commission of Alaska*, 194 Fed. 2d 447 Ninth, C.C.A. 1945, this court dealt with "canning establishments in Alaska at Chignik, Carluk and Bristol Bay. The establishments consisted of canning factories and the premises surrounding them, with quarters for the fishermen and cannerymen, fishing boats and housing for the supplies and equipment of the establishment and their employees." (Page 450 of the Ninth Circuit Court Opinion). The Supreme Court of the United States in affirming in part the decision of the Ninth Circuit Court stated "we conclude that under the circumstances of this case the dispute was 'at the factory, establishment, or other premises' in the sense intended by the Territorial legislature" (329 U.S. 143 at Page 156; 1946). Incidentally, the Ninth Circuit Court and the Supreme Court used the principle of *noscitur a sociis*, just as we suggest that the court here apply the same principle by linking the word "industrial" with the word "establishment" in construing Schedule C.

Thus, in the only instances where the matter has been brought to the attention of the Ninth Circuit Court of Appeals, this court has ruled that the word "establishment" is defined as Petitioner contends, namely, to include Petitioner's nineteen apartment houses on one functionally integrated tract, physically

proximate to one another and operated as a general unit.

(b) Dictionary Definition No Help.

The Court of Appeals relies on Webster's unabridged dictionary in part for the definition of "establishment" (Op. 13). Part of that definition is "the place" where one is permanently fixed for residence or business. The place where petitioner is permanently fixed for business is the site of the apartments concerned in this litigation. Webster's New International Dictionary, Second Edition, is used to support the opposite meaning of "establishment" by the Appellate Division of the Superior Court of New Jersey in *Ford Motor v. N. J. Dept. of Labor*, 71 A. 2d. 727, and by the Court of Appeals of Kentucky in *Snook v. International Harvester Company*, 276 S.W. 2d. 658.

(c) Appellate Court Errs in Stating That Each Building in Project Is Distinct as to Identity and Operation.

The Court of Appeals is mistaken in its assertion (at Page 13, Opinion) that "here the identity and operation of each plaintiffs' apartment house is separate and distinct from the others". The identity and operation of each building in petitioner's project is common to the entire establishment. The buildings do not have separate names; they are not managed by different persons. The rent is paid to a common agent; the apartments are let by a common agent. The grounds are contiguous and undivided by dedicated streets. The project has one mortgage; it has posted one utility bond with the City of Anchorage

to cover its electricity consumption in the common areas of all buildings; and the buildings are taxed by the City as one unit.

(d) Fleming Case Is Not at All in Point.

The Court of Appeals cites as its only court decision on the meaning of "establishment" a 1941 decision of the District Court for the Eastern District of Pennsylvania, *Fleming v. American Stores Co.*, 42 F. Supp. 511. The quoted sentences from the District Judge's opinion in Fleming should be construed in the light of the circumstances of that case. The question there was phrased by the Judge as follows:

"What is a 'retail establishment' within the meaning of Section 13(a) (2) of the Fair Labor Standards Act of 1938?

Specifically, is a \$33,000,000 chain store organization, employing more than 14,000 workers, with gross annual sales of \$115,000,000, which directly and through wholly-owned subsidiaries operates 2,300 retail grocery stores and eleven warehouses in seven states and the District of Columbia, along with food-processing and manufacturing plants, etc., a 'retail establishment'?" [When the Court of Appeals modified this decision in 133 Fed. 2d 840 it pointed out an even greater diversity of operations.]

The court actually is not construing the word "establishment", but as it points out at Page 516, it is determining the legislative intent of the Congress as to what Congress meant by a "retail establishment". It had before it not only rules and interpretive bulletins

of the Wage and Hour Division, but it had the legislative history of the particular section of the Fair Labor Standards Act which, as it points out, had to be strictly construed against the defendant because the chain store involved was trying to claim an exemption through its contention that:

“... The retail establishment of the defendant is the entire business of the defendant including its main offices, its warehouses, its bakeries, its multigraphing plant, its manufacturing operations, its transportation facilities and its repair and machine shops.”

Certainly the foregoing case — the only one mentioned by the Court of Appeals — is slender authority for the construction of Schedule C with its reference to “industrial establishments” as well as other establishments!

We have found no case which would even hint that the word “establishment” is limited to a single building or would not apply to petitioner’s nineteen buildings devoted to one purpose on one tract of land. All cases found, some of which are hereafter cited, hold that many buildings, even geographically separated are one establishment.

(e) Word “Industrial” Was Overlooked in Interpreting Schedule C.

The Anchorage tariff refers to “professional, mercantile, industrial, and other establishments.” This is a far cry from “retail establishment.” An industrial establishment frequently, if not always, utilizes more

than one building. The everyday observation of the common man even confirms this point.

Ford Motor Co. v. Unemployment Compensation Board of Review—(1951) Penn. 79 A. 2d. 121, where it was held that any alleged uncertainty in the meaning of the word “establishment” should be resolved under the doctrine of *noscitur a sociis*, by the words associated with it, such as “factory” and “premises.”

In construing Schedule C of the electrical tariff, therefore, the fact that the City used the word “industrial” would indicate that it contemplated situations where more than one building was involved.

Snook v. International Harvester Company,
276 S.W. 2d. 658. (Ct. App. Ky.—1955).

Mitchell v. Bekins Van & Storage Company,
231 Fed. 2d. 25, 26. (9th C.C.A.—March 1,
1956).

(f) Appellants in Effect Conceded District Court Correctly Defined Establishment.

Appellant in the face of the following cases, which represent the overwhelming weight of authority, did not even argue in its briefs that petitioner’s apartment houses were not an establishment within the meaning of the tariff.

The overwhelming weight of authority defines “establishment” as the District Court defined it:

Spielmann v. Industrial Comm. (1940) Wis.,
295 N.W. 1;

Chrysler Corp. v. Smith (1941) Mich., 298
N.W. 87, 135 ALR 900;

Snook v. International Harvester Company, Ky. (1955) 276 S.W. 2d. 658;

Mitchell v. Bekins Van & Storage Company, 231 Fed. 2d. 25, 26 (9th C.C.A.—March 1, 1956);

Matson Terminals v. California Employment Comm. Cal. (1944) 151 P. 2d. 202;

Claim of Lasher, 111 N.Y.S. 2d. 356, New York Sup. Ct. App. Div. 1952;

Phillips v. Walling, 324 U.S. 490; 89 L. ed 1095 (1945);

Philadelphia Water Company v. Pennsylvania Public Water Commission, (1949) Pa. 64 A. 2d. 500;

28 A.L.R. 2d. beginning P. 324.

Spielman v. Industrial Comm. (1940) Wis. Sup. Ct. 295 N.W. 1. An automobile body manufacturing plant and a manufacturing plant for auto parts, though forty miles apart, were held to constitute an establishment, the Court stressing the place of employment rather than singleness of management and product, and the Court basing the decision on "the physical proximity, functional integrality, and general unity."

Chrysler Corp. v. Smith, (1941) Mich. 298 N.W. 87, 135 A.L.R. 900, held that the main automobile plant and other plants located in nearby areas, which were functionally integrated and highly synchronized with the main plant, constituted one "establishment"

within the meaning of the statute. Thus, various business plants, united under a single ownership although separate in place, were held to be one establishment. The Court applied the test of "the physical proximity, functional integrality and general unity" of the nine plants of the Chrysler Corp. located in Michigan all within eleven miles of the main plant.

Snook v. International Harvester Company, Ky. (1955) 276 S.W. 2d. 658, defined the unqualified word "establishment" as used in the Kentucky Unemployment Compensation statute. The company in Kentucky had a coal mine at Benham, a sales office in downtown Louisville, and the Louisville Works (a farm equipment factory) in another section of Louisville. The foundry and machine shop of the Louisville Works were housed in separate buildings. The Court said, "if the foundry and machine shop are different establishments, appellants are entitled to unemployment compensation; otherwise not." The Court held that the two were one establishment because:

- (a) The two are functionally integrated.
- (b) There is a general unity both in the operation of the plant and in the nature of the employee.
- (c) Their physical proximity is such as to constitute a single unit.

In *Mitchell v. Bekins*, 231 Fed. 2d. 25 (9 C.C.A. March 1, 1956) the 9th Circuit Court of Appeals, in a Fair Labor Standards Act case, held that the five scattered Bekins Storage warehouses in downtown Los Angeles were one "establishment." The buildings were separated and were neither contiguous nor widely scattered. The proprietor's unit of operation and control were considered, plus his natural business policy.

In *Matson Terminals v. California Employment Commission* (1944 Cal.) 151 Pacific 2d. 202, the term "establishment" was applied to longshoremen assigned to various employers, and the word was held to include the places of employment, namely, the various docks covered by the contract, where the longshoremen customarily worked.

In *Claim of Lasher*, New York Sup. Ct. Ap. Div. 1952, 111 N.Y.S. 2d. 356, the Lackawanna New York Bethlehem Steel Company plant was held to be one "establishment." Obviously, this enormous plant was made up of many buildings.

In *Phillips v. Walling*, 324 U.S. 490; 89 L. ed 1095 (1945) the U.S. Supreme Court, in a Fair Labor Standard Act case, held that when Congress used the word "establishment" it used it as it is "normally used in business and in Government — as meaning a distinct physical place of business." The

Court said in footnote 6 at Page 496 of 324 U.S. that:—"Prior to the adoption of the Fair Labor Standards Act the term 'establishment' was used in the sense of physical place of business by many census reports, business analyses, administrative regulations, and state taxing and regulatory statutes."

In *Philadelphia Water Company v. Pennsylvania Public Water Commission*, 1949 Pa. 64 A. 2d. 500, or the "Colonial Gardens Case," the tariff made use of the words "commercial" and "establishment," and the court held that the eleven buildings on one plot of ground, with one mortgage, the project being taxed as one unit, constituted a single establishment. The Colonial Gardens Project would have met the tests of "functional integrity, physical proximity, and general unity." The Colonial Gardens Project would likewise have been considered one "place of business."

In 28 A.L.R. 2d., beginning at Page 324, is an exhaustive note dealing with "establishment, factory, or other premise." In this note are collected all of the "establishment" cases and the various tests used to define the meaning of the term "establishment" are set out and discussed in full.

In the Instant case, Petitioner's place of business was the Richardson Vista unified tract upon which were its nineteen apartment

buildings; it had no other place of business. Thus, the "place of business" test of the Supreme Court and other courts is met. The test of "physical proximity, functional integrality, and general unity" is certainly met by nineteen apartment buildings on twenty-three contiguous acres, managed by a common manager, heated by a central heating plant, taxed as a unit, mortgaged as a unit, owned by one corporation, and devoted to the sole purpose of renting apartments to tenants. The buildings are proximate, the business is functionally integrated, and completely unified.

(g) City Could Have Changed Tariff Had It So Desired.

As a matter of fact, since the inception of this action in January of 1952, all that the City of Anchorage would have had to do to make proper its method of billing petitioner was to eliminate the word "establishment" from its various tariffs and make it clear that the rates applied to each "meter," or each "service drop," or each "building."

The City, contrariwise, however, in its Schedule C, applies its consumption rates to establishments, but its minimum charges to meters. The last line of Schedule C is "minimum monthly charge per meter," not per establishment (R. 12).

In fact, the decree [not judgment] entered in favor of petitioner purports to restrain the City only "from applying its rate schedules separately to each build-

ing within the establishment owned by plaintiff, Richardson Vista Corporation unless such practice be sanctioned by duly promulgated and legally sufficient ordinance or regulation . . .” (R. 61).

POINT VI.

APPELLATE COURT ERRED IN BELIEVING CITY MANAGER HAD INTERPRETED TARIFF.

This Court, in its opinion at Page 14, suggests that the City Council properly delegated to the City Manager the right to interpret Schedule C. The provision of the Anchorage City Code cited above in Point IV, setting forth the requirements of publication of such rules and regulations as might be adopted, was not brought to the attention of this Court because the point had not been raised by appellant.

Further, it is fundamental that the situation which must be considered is that prevailing at the time the complaint herein was originally filed. The Anchorage City Manager at that time, Mr. Sharp, did not purport to interpret the word “establishment” as relating to a single service drop. And the City Council, in refusing to afford relief to petitioner, had predicated its refusal upon the City’s need for additional revenue and upon some alleged prohibition in the National Electric Code. (R. 191, 192, 194, 216, 402, Rich. Vista Brief, P. 11). The refusal was not based on policy, or practice, despite the careful wording of Ex. K.

Exhibits 4 and 5 disclose that the City was not relying on policy, but that in its efforts to refuse peti-

tioner justice under Schedule C, the City was invoking a strained interpretation of a provision of the National Electric Code.

POINT VII.

APPELLATE COURT OVERLOOKED SIGNIFICANT PORTIONS OF LAND TITLE CASE: LAND TITLE FACTS ARE NOT EVEN CLOSELY RELATED TO OUR FACTS.

The Court of Appeals in its opinion at Page 8 relies in part upon *Land Title Bank and Trust Company v. Pennsylvania Public Utility Commission*. The Court overlooked *Philadelphia Water Company v. Pennsylvania Public Water Commission*, hereafter called the "Colonial" case, (64 Atlantic 2d. 500) which pointed out that in Land Title diversity of ownership was involved, while in the *Colonial* case all buildings belonged to one owner and there was but one consumer. The *Colonial* case is in all respects like the Richardson Vista Corporation situation, and was discussed beginning at Page 9 of Richardson Vista Corporation's brief herein.

In the opinion rendered by this Court, the second sentence of the paragraph at bottom of Page 8 and top of Page 9 is not at all clear; the words "public policy" do not appear in the *Land Title* case, nor was public policy an issue in that case.

The customer in Land Title wanted to wholesale or resell electricity to tenants, a practice universally prohibited.

The Court did not quote the distinguishing facts from the opinion in Land Title. Those distinguishing facts are set out in full in Point X hereafter in this petition.

POINT VIII.

THE COURT OF APPEALS OVERLOOKED CONVINCING EVIDENCE THAT THE CITY INTENDED TO DEPART FROM THE PRACTICE EXISTING BEFORE THE REPEAL OF ORDINANCE 55.

The Court, at Page 8, mistakenly cites Judge Folta's opinion as stating that "it appeared that the City officials were unaware of the repealing effect of Ordinance 283 . . . " As a matter of fact, Judge Folta said the opposite, namely, that the denial by the City council of relief for plaintiff "would appear to indicate knowledge of the repeal." (R. 48).

In any event, the Court of Appeals, in its opinion, states that to overcome the practice which had been followed by the City for thirty years "there should be some definite proof of the City's intention to depart therefrom." (Op. P. 8).

The proof of the City's intention to depart therefrom, if the express repeal of Section 24 of Ordinance 55 will not suffice, is found in Schedule C which was enacted shortly after the repeal. The use of the word "establishment" in Schedule C, especially when that word is linked with "industrial," clearly indicates that after the repeal of Ordinance 55 the City intended its electrical rate scale to apply where the normal attributes of an establishment are present — con-

tiguity, common ownership, one consumer, and the other criteria set out in the *Colonial* case cited above.

The Court of Appeals, on Page 8, likewise assumes that the City's rate schedule is silent on the subject of combined billings. Petitioner submits that the very use of the word "establishments" speaks loudly. The City could easily have used the word "building" or "service drop" or "meter" if that is what it intended. The language of the last line of Schedule C is noteworthy. Where, when the City in that schedule refers to actual consumption of electricity, it uses the word "establishments," still at the last line, where it is referring to a minimum monthly charge, it uses the phrase "minimum monthly charge per meter," not per establishment. (R. 12, Ex. C).

POINT IX.

APPEALS COURT MISINTERPRETS PETITIONER'S POSITION RESPECTING ADOPTION OF ORDINANCE 283.

Petitioner's contention has apparently not been made clear to the Court of Appeals. At Page 8 in its opinion, the Court states that plaintiffs contend the adoption of Ordinance 283 [of which Schedule C was not a part, although the Court of Appeals so states] amounted to an abandonment of a practice which had existed for thirty years. Petitioner does not so contend. During the twenty-four years that Ordinance 55 was in effect, the City did, of course, comply with its own law. The repeal of Ordinance 55 left a vacuum.

At that time there was no established practice, policy, rule or regulation. The vacuum was filled when the City adopted Schedule C and used the word “establishments” linked to the word “industrial” and contrasted to the use of the words “per meter” in the same schedule.

POINT X.

APPEALS COURT CITES FIVE CASES SUPPOSEDLY INVOLVING LEGALITY OF COMBINED BILLING WHEN TARIFFS WERE SILENT ON THE SUBJECT; ALL FIVE HOWEVER INVOLVED DEFINITE, ARTICULATE TARIFFS; ALL REPRESENT ENTIRELY DIFFERENT FACTUAL SITUATIONS.

- (a) Land Title Case Distinguished; Tariff Present, Wholesaling Present, Diversity of Ownership Present, Diversity of Possession Present, Tracts Apparently Not Contiguous.

At Page 8, the Opinion of this Court states that a majority of the authorities in passing on the issue “have held that where a Schedule is silent on the subject, the combined billing practice is prohibited.” The Court then cites the *Land Title Bank* case and seems to place chief reliance for reversal on this decision. But in *Land Title* the schedule was not silent. As appears at Page 9 of the opinion, in *Land Title*, “the commission had a rule to the effect that ‘unless otherwise stipulated, the rates named in the tariff for each class of service are based upon the supply of the service to one entire premise through a single delivery and metering point. Separate supply for the same customer shall be separately metered and billed’ ”. This case did not involve single ownership, as the Court

pointed out subsequently in the *Colonial* case, and which fact of manifold ownership is expressly stated in Land Title.

Further, this Court may not have realized that Land Title involved an application to wholesale electricity, apparently to tenants of apartments and buildings, not just in connection with common areas where the electricity was furnished by the project owner.

This Court, when at Page 9 of its opinion it quoted from Land Title, did not take into account the three paragraphs of the Land Title opinion immediately preceding the quoted portion, which paragraphs indicate the great discrepancy between the factual situation in Land Title and the factual situation which confronts petitioner.

“As a result of the transactions hereinbefore recited, some of the dwellings now are held and occupied by non-defaulting certificate owners; some are occupied as tenants, respectively, of four unrelated building and loan associations, mortgagees-in-possession; some are occupied by tenants of a building and loan association claiming ownership through the settlor of the trust and some are occupied as tenants of a fifth building and loan association. Also, by reason of the same, appellant functions as trustee under the trust as to the certificate owners, as a rental agent severally for each of the four mortgagees-in-possession and as a rental agent for the building and loan associations, not mortgagees-in-possession.

“Because of the physical, structural and geographic characteristics of the development and of the manifold ownership, possessory and occu-

pancy interests pertaining thereto, intervening appellee declined to treat the 264 dwellings or the appellant in its diverse relationships thereto, as a single customer unit for single point electric service.

“Quoting from the report of the commission: ‘Taking into consideration all the evidence presented, that the Certificate Holders are the ‘equitable owners’ and in many instances the occupants of each apartment, that the trustee’s duties are limited and not discretionary, that no profit was contemplated, that the whole group of apartment house dwellings in general does not have common conveniences, that for all practical considerations each is a separate and distinct residence having all the necessary facilities and being entirely complete in itself, it is our opinion that this association is not such a bona fide business unit as would entitle it to come within the wholesale Power and Light Classification of respondent’s tariff.’”

(b) Raceland Distinguished; Ordinance Clear (non-silent) in Raceland.

Neither was the “schedule silent” in the next case cited by this Court, *City of Raceland v. Colvin*, 95 S.W. 2d. 1113 (Op. 10). The City ordinance provided “no meter shall be used to furnish more than one building.” The City regulations require a deposit of \$5.00 for each building. The owner refused to make more than one \$5.00 deposit. Three buildings were involved; there were two different possessory interests, another ownership interest; and the applicable regulations specified “building” rather than “establishment.”

(c) American Water Works Distinguished; Wholesaling Present; Express Tariff Applicable to Buildings Was Present.

In *United States v. American Water Works* (Op. 10), the 1889 trial court considered a situation where a special tariff prescribed a rate for each different type of building and the consumer tried to aggregate all types of buildings for a single application of the rate. Thus the tariff made each building a consumer. Some 75 to 100 tariff provisions existed which were not quoted by the Court. The decision has no application to the present matter.

In a note found in 61 L.R.A. at Pages 111-112, appears the following digest of the American Water Works holding, which also indicates that the tariff made each building a consumer:

“A water company authorized to charge specified rates for buildings of different characters, and according to the number of rooms in dwelling houses, is not required to supply to a military reservation, comprising dwellings for officers, hospitals, warehouses, and barracks as a single consumer. *United States v. American Waterworks Co.*, 37 Fed. 747.”

The Court of Appeals at Page 10 of its opinion quotes further language from the 1889 decision concerning common ownership of 20 to 30 residences which are rented to various tenants. To permit conjunctive billing in such a case would either permit the owner of the residences to wholesale the utility or would indeed be discriminatory of other tenants. We strongly suspect that among the 75 to 100 other regulations was one prohibiting wholesaling, because the

Court said at Page 750 that to decide otherwise would permit one to "contract for all the water from defendant and subcontract it to various consumers in the City." Note that in our case the only regulation, rule, or ordinance was Schedule C.

(d) New York Public Utility Cases Distinguished; Express (Non-Silent) Tariffs Existed.

In the next two cases cited by this Court, both New York Public Utility Commission hearings (Op. 10 and 11) there was no silence as to conjunctive billings. Express provisions governed when and how the practice could be followed, and the Board hearings were interpretations of existing rules.

The earlier of these, *Realty Supervision Company v. Edison Electric*, Public Utility Reports 1917B, P. 962, involved an application to the Utility Company for a wholesale rate upon various stores rented from the applicant by various tenants. The application was made under a tariff providing for combined billing where common ownership existed and the buildings were not more than 100 feet apart. The Commissioner refers to his own prior dissenting opinion, and it is that dissenting opinion which is quoted by this Court at Pages 10 and 11 of its decision. The Commissioner states that he believes "the Brooklyn Company has done well to cancel this rider".

This 1916 decision of the New York Public Service Commission is not an adjudication before a tribunal; it involves an effort to wholesale electricity to stores operated by different owners; it is infested not only by a peculiar and specific tariff but by the rules and regulations of the Commission. It certainly is no au-

thority either for or against petitioner's contentions in the instant case.

The second Utility Commission Case, *New York Edison Company et al.*, 10 Public Utilities Reports, N.S., 244, cited at Page 11 of the Appellate Court's Opinion is an "investigation of electric rates; Commission's views expressed on proposed rates". In its twenty-page dissertation, the Commission engages in the discussion cited by this Court and continues, to point out that under the proposed schedules the owner could group all the properties he controls so long as two of them are not more than 100 feet apart. The Commission opines that such a tariff provision is not justified. Again there is no adjudication before a tribunal; no similarity of facts; and a tariff provision far from silent deals with the subject of combined billings.

POINT XI.

OTHER MISTAKES.

Various mistakes have occurred in the opinion of this Court. Some of them may be immaterial, but petitioner respectfully invites the Court's attention to the following if for no other purpose than to make a clear and legible opinion, should it be published:

- (a) The Court, at Page 7, line 6, of the opinion, refers to the "judgment". It ignores the "decree" entered by Judge McCarrey and appearing at Page 59 of the record.
- (b) The Court refers to Ordinances 282 and 293 at various places in the opinion, when Ordinance 283 is intended.

- (c) The word “but” is included after the word “establishments” in line 4 of Schedule C at Pages 5, 12, and 14; the word “but” does not so appear in Schedule C.
- (d) The word “combined” is not found in the prayer of the complaint, although at Page 3 of the opinion, the Court indicates that it is.
- (e) The word “owned” is omitted from the quotation at the top of Page 5 of the opinion, following the word “though”, although the word is included in Judge Folta’s opinion.
- (f) The word “building” is omitted following the word “individual” in line 6 of Page 6 of the opinion, although the word is included in the District Court opinion.
- (g) The words “combined metering” are substituted for the words “combining meter” in line 23, Page 6 of the opinion, although the District Court opinion uses the latter words.
- (h) The words “of the sliding benefits” should be omitted from line 33 of Page 6 of the opinion for obvious reasons.
- (i) The words “and substantial” should be inserted following the word “reasonable” in line 17 of Page 7 of the opinion because they appear in the judgment entered by Judge McCarrey.
- (j) Schedule C was no part of Ordinance 283 as indicated in lines 10 and 11 of Page 8 of the opinion. (See Ex. 10.)

CONCLUSION.

In conclusion, since it has been uncontrovertibly shown that Section 24 of Ordinance 55 was not inadvertently repealed, or even repealed by implication, but on the contrary was expressly repealed by section number, the entire effort of the City to avoid applying its published tariff to petitioner's situation can rest on only one point, namely, whether or not the common areas of petitioner's apartment buildings are an establishment. The authorities are so overwhelming in supporting the District Court ruling on this point that petitioner should have a rehearing by the Court of Appeals.

Dated at Anchorage, Alaska, this 25th day of April, 1957.

JOHN S. HELLENTHAL,

RALPH H. COTTIS,

HELLENTHAL, HELLENTHAL & COTTIS,

Attorneys for Appellee and Petitioner Richardson Vista Corporation.

Note No. 1: Appellee, Panoramic View Corporation, did not see fit to petition for rehearing, apparently relying on petitioner to undertake this burden. Should rehearing be granted, elementary justice would dictate that appellee, Panoramic View Corporation, be permitted to participate in the rehearing along with petitioner.

Note No. 2: Underlining and parenthetical matter in the foregoing petition has been supplied by petitioner unless otherwise indicated by the context. Material included between crotchets represents the opinion of petitioner.

Note No. 3: In reviewing the District Court Record it is not always apparent that a substantial portion of the record reflects a pre-trial conference rather than the trial itself. Pages 81 to 156, and pages 39, 40 and 41 constitute the pre-trial conference.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated at Anchorage, Alaska, this 25th day of April, 1957.

JOHN S. HELLENTHAL,
*Of Counsel for Appellee
and Petitioner.*

No. 15100.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LEE ANGUS DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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FILED

JUL -2 1956

PAUL P. O'BRIEN, CLERK

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No. 15100.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEE ANGUS DAVIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdiction.

The jurisdiction of the District Court in this case arose under Title 18, U. S. C. A., Section 2314 (June 25, 1948, C. 645, 62 Stat. 806, amended May 24, 1949, C. 139, Sec. 45, 63 Stat. 96), and Title 18, U. S. C. A., Section 3231 (June 25, 1948, C. 645, 62 Stat. 826).

The jurisdiction of this court was invoked under the provisions of Title 28, U. S. C. A., Section 1291 (June 25, 1948, C. 646, 62 Stat. 929), and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (As amended Dec. 27, 1948, eff. Jan. 1, 1949).

Statement of the Case.

Appellant was indicted on two counts of violation of 18 U. S. C., Sec. 2314—Transportation of forged security interstate.

Count One charged that:

“On or about June 28, 1956, defendant, Lee Angus Davis, with unlawful and fraudulent intent, did transport in interstate commerce, namely: from Los Angeles County, California, within the Central Division of the Southern District, to Samson, Alabama, a falsely made and forged security, namely: a check drawn on the Samson Banking Company, Samson, Alabama, payable to Robert A. A. Ladd, in the sum of \$6,000.00, and purporting to have been signed by Harry C. Walters; and the defendant then knew said security to have been falsely made and forged.”

Count Two provided that:

“On or about July 21, 1955, defendant, Lee Angus Davis, with unlawful and fraudulent intent, did transport in interstate commerce, namely: from Los Angeles County, California, within the Central Division of the Southern District, to Samson, Alabama, a falsely made and forged security, namely: a check drawn on the Samson Banking Company, Samson, Alabama, payable to Robert A. A. Ladd, in the sum of \$6,000.00, and purporting to have been signed by Harry H. Walters; and the defendant then knew said security to have been falsely made and forged.”

On December 19, 1955, appellant was sentenced by the Honorable Harry C. Westover, to three years on his plea of guilty to Count Two of the indictment. On motion of the Government, Count One was dismissed.

On January 9, 1956, appellant filed his notice of appeal from the judgment of conviction of December 19, 1955, and requested bail pending appeal. Also on January 9, 1956, appellant filed his "pauper's affidavit," which was, in effect, a petition to Judge Westover for permission to proceed on appeal *in forma pauperis*. From the records of the District Court, it appears that on the same date Judge Westover entered an order denying the petition to proceed *in forma pauperis*. Appellant then applied to this Honorable Court for permission to proceed *in forma pauperis*. By *per curiam* of February 23, 1956, Judge Westover certified in writing that the within appeal is without merit and not taken in good faith, and upon that ground denied the motion of appellant to proceed *in forma pauperis*.

Evidently the existence of Judge Westover's order of February 23rd was not brought to the attention of this Honorable Court, for on March 17, 1956, this Court handed down an order granting appellant leave to proceed *in forma pauperis*, on the ground that the trial court had failed to certify in writing that the appeal was not taken in good faith.

Although ably represented by counsel in the court below, appellant undertakes this appeal *in propria persona*. He has failed to comply with even the most rudimentary requirements of federal appellate practice. He is proceeding *in forma pauperis* when, technically, he should be barred from so proceeding. He has made no designation of record. He has provided no reporter's transcript to complete his record. He has made no formal specification of error, and his "Brief of the Records," filed herein, is written in disconnected, rambling style, and is influenced less by reality than by his peculiar conception of legal euphonics.

However, being mindful of the admonitions of the Supreme Court, and of this Honorable Court, that we are not to demand of a layman and pauper that degree of skill and competence normally expected from a person with legal training,

Tompkins v. Missouri (1945), 323 U. S. 485, 487;

Darr v. Burford (1949), 339 U. S. 200, 203;

Price v. Johnson (1947), 334 U. S. 266, 291;

Cochran v. Kansas (1941), 316 U. S. 255, 257;

Holiday v. Johnson (1940), 313 U. S. 342, 350;

Darcy v. Teets (9th Cir., 1955), Misc. 469;

Thomas v. Teets (9th Cir., 1953), 205 F. 2d 236;

in an effort to aid the court we will consider appellant's position in more detail than would normally be the case.

Appellant's Apparent Specification of Errors.

In common with many "pro pers," appellant does not clearly enumerate the points on which he intends to rely, in attacking the appealed judgment. Appellee has taken the liberty of setting out the following tentative specification of error, since from a consideration of appellant's brief it appears that he assigns the following points as error. References hereinafter are made to appellant's brief (Br.), and the clerk's transcript [Clk. Tr.]:

I.

THE HONORABLE DISTRICT JUDGE WAS BIASED AND PREJUDICED AGAINST THE APPELLANT (Br. 5).

II.

THE HONORABLE DISTRICT JUDGE REFUSED TO ALLOW APPELLANT TO SUBPOENA WITNESSES, IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS (Br. 5).

III.

THE ARRESTING FEDERAL OFFICERS USED ILLEGAL MEANS TO EXTRACT A CONFESSION FROM APPELLANT AND CAUSED HIM TO INCRIMINATE HIMSELF AGAINST HIS WILL, IN VIOLATION OF THE FIFTH AMENDMENT (Br. 5).

IV.

THE APPELLANT'S RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WERE VIOLATED (Br. 5, 14).

V.

APPELLANT WAS WRONGFULLY INDICTED FOR INTER-STATE TRANSPORTATION OF A FORGED SECURITY, INASMUCH AS HE HAD NOT LEFT THE CONFINES OF LOS ANGELES COUNTY FOR THE ENTIRE YEAR OF 1955 (the period in which the offense occurred) (Br. 6, 7, 8, and 9).

VI.

APPELLANT WAS FALSELY ADVISED BY HIS COUNSEL THAT HE WOULD RECEIVE PROBATION IF HE WOULD PLEAD GUILTY TO ONE COUNT OF THE INDICTMENT (Br. 9, 10, and 11).

VII.

THE DISTRICT JUDGE ABUSED HIS DISCRETION BY REFUSING TO ALLOW APPELLANT TO WITHDRAW HIS PLEA OF GUILTY AND ENTER A PLEA OF NOT GUILTY, "TO PROVE HIS INNOCENCE OF THE CHARGES" (Br. 10, and 11).

VIII.

APPELLANT IS ILLEGALLY DETAINED BECAUSE, WHILE HE OFFERED TO PLEAD GUILTY TO COUNT ONE, THE COURT ACCEPTED THE PLEA AS TO COUNT TWO, AND COUNT ONE WAS SUBSEQUENTLY DISMISSED ON MOTION OF THE GOVERNMENT (Br. 13).

Assuming such to be the case, these points will be briefly discussed below.

ARGUMENT.

I.

Judge Westover Was Not Biased and Prejudiced Against Appellant.

This objection appears to be based upon the theory that, by imposing the sentence of December 19, 1956, the District Judge showed his bias against the appellant, thus violating his constitutional rights. *Prima facie*, such contention is absurd. It must be remembered that at all times through sentence in the court below, appellant was represented by retained counsel. Appellant was convicted not by trial but upon his plea of guilty to one count of violation of 18 U. S. C. A., Sec. 2314.

Any attack on the sentence based upon the bias of the Judge must be based, perforce, not upon the manner in which the conviction was obtained, but upon some abuse of discretion on the part of the court in the imposition of the sentence itself. The sentence imposed was three years imprisonment. In view of the fact that the maximum sentence permissible under 18 U. S. C. A., Sec. 2314, is ten years and/or \$10,000.00, the sentence imposed was comparatively light. It is of course settled, that where the sentence imposed by the trial court is within the statutory limits, there can be no abuse of discretion. (*James Boyd Brown v. United States* (9th Cir., 1955), 220 F. 2d 293.)

II.

Judge Westover Did Not Violate Appellant's Constitutional Rights by Refusing to Allow Appellant to Subpoena Witnesses.

When appellant pleaded guilty, any need for adducing testimony was at an end. The question of appellant's guilt was determined, and it remained only for the court to impose sentence. The function of the witness had been by-passed by appellant's admission of the ultimate question of guilt. While from the record presently before this court, it is not apparent whether appellant requested that witnesses be subpoenaed, it is, nonetheless, clear that where there is a guilty plea conclusively determining the litigation, the function of the witness is precluded. Thus, even assuming arguendo the alleged denial by the court of subpoena following a plea of guilty, the court acted correctly in this respect.

III.

Appellant Can Not Complain That Federal Officers Here Caused Him to Incriminate Himself in Violation of the Fifth Amendment.

In this objection, appellant charges that the Federal Officers obtained the evidence for conviction by illegal means, and further caused appellant to incriminate himself against his will. It is not specified in what manner appellant was caused to incriminate himself, nor what the illegal means were by which the Federal Officers were alleged to have obtained evidence; however, since, with the advice of counsel, appellant freely entered a guilty plea, it can only be assumed that by this objection appel-

lant conceives that his plea of guilty, in and of itself, is self incriminatory in a manner protected by the Fifth Amendment. Historically, the plea of guilty has been available to an accused throughout the long history of Anglo-Saxon law. Its use long pre-dates the adoption of the United States Constitution. Since it was in use prior to the Fifth Amendment, it does not fall within the purview of the protection of that Amendment. Therefore, the plea of guilty cannot be barred by invocation of the Fifth Amendment.

IV.

Appellant's Rights Against Unreasonable Search and Seizure, Were in No Way Violated.

The gravamen of this objection seems to be that two FBI Agents allegedly entered appellant's home, arrested him without a warrant and searched his premises, seizing sundry personal documents.

As in the foregoing specifications, this objection is not well taken in light of appellant's guilty plea. This is not the usual case where an appellant objects to the admission in the court below, of illegally obtained evidence. The instant conviction was in no way based upon evidence illegally seized or otherwise, but was based, solely upon appellant's plea of guilty to Count Two of the indictment. Even assuming, *arguendo*, that appellant is correct (and he is not) in his statement that certain of his personal papers were seized without a proper warrant, it is in nowise clear in what way appellant's plea of guilty, and the conviction thereon, is affected by such seizure. Lacking materiality, this ground should be ignored by this Honorable Court.

V.

It Is Not an Essential Element to a Violation of 18 U. S. C., Sec. 2314, That the Accused Personally, Physically Convey a Forged Security in Interstate Commerce.

Appellant erroneously assumes that, in order to predicate a conviction under 18 U. S. C., Sec. 2314, it must be shown that the accused must have personally, physically transported the forged security in question in interstate commerce. Based upon this untenable supposition, he attempts to prove his innocence by showing his unbroken physical presence in Los Angeles County for the entire period in question. Thus, he supplies the names of various persons who will testify to his presence, and demands that this Court order an investigation to substantiate his claims. The fallacy to this position is, of course, that appellant's continued and uninterrupted residence within Los Angeles County during the period of the crime is immaterial, since, as in most statutes of this type, a person may violate the statute if he is the active initiating agency for setting in motion the proscribed transaction. In such a case, it is the interstate scope of the transaction which is essential, and not the physical movement in interstate commerce of the accused. Therefore, appellant's physical presence in Los Angeles County during the "entire year of 1955," was immaterial to the question of whether or not he had caused the prohibited interstate movement. Thus, in *Pereira v. United States* (1954), 347 U. S. 1, 74 S. Ct. 358, 98 L. Ed., Pereira was convicted of a violation of 18 U. S. C., Sec. 2314, in that

he caused a fraudulently obtained check to be transported in interstate commerce. The court stated, at page 9 of the U. S. report:

“The transporting charge does not require proof that any specific means of transporting were used, or that the acts were done pursuant to a scheme to defraud, as is required for the mail charge. . . . When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he ‘caused’ it to be transported in interstate commerce.”

A strikingly similar situation was presented in *United States v. Taylor* (2nd Cir., 1954), 217 F. 2d 397, where appellant waived indictment and pleaded guilty to an Information charging him with—

“‘transporting’ in interstate commerce ‘falsely made’ and ‘forged’ ‘securities’ ‘with unlawful or fraudulent intent.’”

—all in violation of 18 U. S. C., Sec. 2314. More specifically, appellant was accused of transporting, in interstate commerce, checks drawn on fictitious and non-existent bank accounts, knowing the same to have been falsely made and forged (an almost perfect duplication of the facts in the instant case). Appellant subsequently sought to vacate the resultant conviction, on the ground that the sentence was imposed in violation of the laws of the United States, because the facts alleged were not within the statute. On these facts the court held that the appellant, by cashing checks drawn on the fictitious and non-existent bank accounts in another state, “caused”

such checks to be transported in interstate commerce within the meaning of 18 U. S. C., Sec. 2314.

From the foregoing it is apparent that for the purposes of 18 U. S. C., Sec. 2314, as for other statutes of this type, personal conveyance through interstate commerce is not necessary. It is sufficient if the accused is the activating force behind the scheme. Therefore, appellant's presence or absence in Los Angeles County during the period of the crime is immaterial.

VI.

Appellant May Not Complain of Alleged Misrepresentation by His Retained Counsel.

During the course of the proceedings below, appellant was ably represented by the office of Harrison Dunham, Esq. Said counsel was retained by appellant for his defense. It was on the advice of Mr. Dunham that appellant entered his plea of guilty to Count Two of the indictment.

On this appeal it is apparently appellant's contention that he was misrepresented by Mr. Dunham, in that he was advised by him to plead guilty. Appellant claims he was "falsely advised" (Br. 10) that "said counsel for the defense . . . deliberately deprived the petitioner's constitutional rights and mis-presented the petitioner throughout the entire court proceeding" (Br. 11). Nothing in the record shows that appellant received anything but efficient, able representation by Mr. Dunham. He retained Mr. Dunham for his defense, and was represented by him at his arraignment [Clk. Tr. 3] and at

each of the succeeding five hearings culminating in the conviction and sentence of December 19, 1955 [Clk. Tr. 4, 7, 8, 9, 10]. There is nothing herein to even so much as intimate that Mr. Dunham's advice to appellant was anything but sagacious and sound. On the contrary, the very nature of some of the grounds of ostensible defense, raised here by appellant, tend to justify such advice.

Appellant received all the Constitution guarantees him in the matter of a regular proceeding and representation by counsel. Even where counsel does err (and we are quick to say here that we feel that Mr. Dunham did not), it is established that a defendant is bound by the actions, including mistakes, of his attorney unless the incompetence is such as to make farcical, the proceedings. As stated by the United States Court of Appeals for the District of Columbia in *Diggs v. Welch* (C. A. D. C., 1945), 148 F. 2d 667:

"It is clear that once competent counsel is appointed his subsequent negligence does not deprive the accused of any right under the Sixth Amendment. All that amendment requires is that the accused shall have the assistance of counsel. It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment."

The Constitution guarantees an accused in a criminal case the right to the assistance of counsel for his defense. He is not guaranteed the best counsel or the wisest, or the most experienced, or the most capable. He may not

insist upon a legal wizard or miracle worker, but must be content with an average competent counsel of the community. This appellant received, at the very least. He claims that counsel told him a guilty plea would result in probation, but it is apparent that in this respect either counsel or appellant was in error. As a result of this misunderstanding, which may or may not have prompted his plea, appellant now indulges in the all too common practice of making counsel the scapegoat and, by such stratagem, attempting to avert the consequences of his own act. This court recently commented on this practice in *Latimor v. Cranor* (9th Cir., 1954), 214 F. 2d 926, wherein Judge Denman stated:

“The application alleges that Latimor’s attorney mishandled his case. This is a frequent contention of unsuccessful defendants. There are no allegations showing the attorney’s conduct was so incompetent that it made the case a farce, requiring the court to intervene on his client’s behalf.”

See also—

Strong v. Huff (C. A. D. C., 1945), 148 F. 2d 692;

Jones v. Huff (C. A. D. C., 1945), 152 F. 2d 14;

United States ex rel. Mitchell v. Thompson (1944), 56 Fed. Supp. 683.

Likewise in the instant case, there is nothing in the record which would make the case so farcical as to warrant intervention by this Honorable Court on behalf of the appellant.

VII.

The District Judge Did Not Abuse His Discretion by Refusing to Allow Appellant to Withdraw His Plea of "Guilty," and Enter a Plea of "Not Guilty."

Appellant next contends that ". . . his constitutional right was denied . . . by the presiding Judge, to withdraw his 'guilty' plea, through a court proceeding to prove his innocence of the charges." A motion to change a plea is, of course, addressed to the sound discretion of the trial judge. There is nothing before this Honorable Court which would support appellant's apparent view, that in denying the attempt to change the plea the trial judge abused his discretion. On the contrary, a brief review of the minute orders discloses a course of vacillation, tergiversation and delay on the part of the appellant, as could only logically result in the action taken by the trial judge. Thus, on September 6, 1955, appellant was arraigned before Judge Byrne and pleaded not guilty to Counts One and Two of the indictment [Clk. Tr. 3].

On October 11, 1955, the case was set for trial before Judge Westover, at which time Mr. Dunham moved that a psychiatrist be appointed to examine the defendant. The motion was granted and the cause continued until November 8, 1955 for trial [Clk. Tr. 4].

On November 8, 1955, the case came on for trial, at which point Mr. Dunham informed the court that the defendant wished to change his plea to Count Two of the indictment. The court granted appellant permission to withdraw his plea of not guilty and enter a plea of guilty to Count Two. The cause was then continued until November 28, 1955, for probation report, for sentence and for disposition of Count One [Clk. Tr. 7].

On November 28, 1955, the cause came on for sentence, whereupon, attorney Dan O'Neill, for appellant, informed the court that defendant wished to withdraw his guilty plea to Count Two of the indictment. The Judge continued the case to December 5, 1955, for further proceedings regarding change of plea, and sentence [Clk. Tr. 8].

On December 5, 1955, the cause came on for sentencing on Count Two and disposition of Count One. Mr. Dunham stated to the court that defendant desired to withdraw his plea of guilty to Count Two of the indictment, and also to obtain other counsel [Clk. Tr. 9]. The case was continued until December 19, 1955.

On December 19, 1955, in proceedings for sentence on Count Two and disposition of Count One, Mr. Dunham stated that appellant wished to withdraw his plea of guilty to Count Two, and to obtain other counsel. After discussion between the court, defendant, and counsel, the court denied the request to change plea, and imposed sentence on Count Two at three years imprisonment. On motion of the Government, Count One was dismissed [Clk. Tr. 10].

The foregoing shows a calculated attempt by the appellant to delay sentence in every way possible. These tactics were properly called to the attention of the court by Mr. Hicks, Assistant United States Attorney, when he stated (according to appellant (Br. 12)), "the petitioner was not trying to get any (new) attorney, whatsoever, for his defense; the Government cannot wait any longer. I hereby make motion to this court to impose the sentence on this 'defendant petitioner'." Although appellant claims by this statement, Mr. Hicks "has committed *Perjury and Prejudice* . . . upon the petitioner," it

is submitted that in the attendant circumstances such representation was entirely proper and that, in granting this motion, the District Judge exercised his lawful discretion in the only reasonable manner in which he could, in the circumstances. Certainly, nothing appears in this record which would indicate the contrary.

VIII.

The Record Before This Honorable Court Does Not Indicate That Appellant Offered to Plead Guilty to Any Other Count Than the Count to Which His Plea of Guilty Was Accepted.

Appellant next contends that his detention is illegal, inasmuch as he actually intended to plead guilty to Count One, rather than Count Two (the count on which he was sentenced). Accordingly, the court allegedly erred in sentencing him on Count Two. Nor can he be sentenced on Count One (the count he allegedly intended to plead guilty to), because the Government has subsequently moved for the dismissal of that count. Appellant therefore alleges the illegality of his detention.

This specification as, in common with many of the specifications hereinbefore discussed, the fatal failing that it finds no basis in the record presently before this Court, but instead is based upon supposition, conjecture and surmise, as well as the appellant's undisclosed intent and unwarranted assumptions. It is well settled in this, and other courts, that the burden of showing grounds upon which a judgment should be reversed rests upon the appellant. (*Jernigan v. Southern Pacific Company* (9th Cir., 1955), 222 F. 2d 245, 248; *Donaher v. United States* (8th Cir., 1950), 184 F. 2d 673.)

Since evidence not in the record cannot be considered by an appellate court, the appellant has the duty to furnish the appellate court with a record which contains the alleged error. In absence of a proper record, a Court of Appeals can only assume that the court below acted properly, and indulge all presumptions in favor of the validity of the judgment.

See

In re Chapman Coal Co. (7th Cir., 1952), 196 F. 2d 779, 785, and Note 6, pages 248-249, in *Jernigan v. Southern Pacific Company* (1955), 222 F. 2d 245, *supra*.

Since appellant's many allegations are not sustained by the record as docketed herein, he has failed in his duty to point out where in the record the complained of errors exist.

IX.

It Was Not Previously Brought to the Attention of This Honorable Court That Judge Westover Had Denied Appellant's Motion to Proceed in Forma Pauperis, and Had Certified in Writing That the Instant Appeal Was Not Taken in Good Faith.

While this point obviously is original, and not in response to the specifications contained in the appellant's brief, the Government would like to bring it to the attention of this Honorable Court at this time.

On March 17, 1956, this Honorable Court granted appellant's motion for permission to proceed on this appeal *in forma pauperis*. No notice was given the Government of appellant's intention to seek such an order from this court. Had the Government been apprised of appellant's intentions, it could have called to the attention of the

court, Judge Westover's order of February 23, 1956 [Clk. Tr. 20], which reads as follows:

"I, Harry C. Westover, hereby certify that, in my opinion, the appeal sought to be taken in the above-entitled cause from the order of the court entered January 9, 1956, is without merit and is not taken in good faith.

"The motion of the petitioner for leave to appeal *in forma pauperis*, is, therefore, denied under the provisions of Title 28, Section 1915 of the United States Code."

It is established by such cases as—

Stanley v. Swope (9th Cir., 1938), 99 F. 2d 308;

Brown v. Johnston (9th Cir., 1938), 99 F. 2d 760;

Waley v. Johnston (9th Cir., 1939), 104 F. 2d 760; and

Holiday v. Johnston (9th Cir., 1941), 123 F. 2d 867,

that under 28 U. S. C., Sec. 1915, when the trial court certifies in writing that in its opinion the appeal is not taken in good faith, this court has no authority to allow an appeal to be prosecuted *in forma pauperis*.

However, inasmuch as this appeal has proceeded to the "brief" stage, the Government has no desire to vacate this court's order at this time, but raises the question for the information of the court and to dispel any inferences resulting from a belief that the trial court, by seemingly failing to certify as per 28 U. S. C., Sec. 1915, had, in effect, condoned the substantiality of the issues raised on appeal.

Conclusion.

For the views expressed above, and especially for the failure of appellant to docket a record in which the complained of errors are apparent, the Government urges that the judgment of conviction appealed from be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

THOMAS H. LUDLOW, JR.,
*Assistant U. S. Attorney,
Attorneys for Appellee,
United States of America.*

No. 15105

United States
Court of Appeals
for the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

vs.

RALPH E. WILLIAMS, Trustee in Bankruptcy
of JOHN E. DUSKIN, Formerly Known as
John E. Duskin, General Contractors, Bank-
rupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

AUG 23 1956

No. 15105

**United States
Court of Appeals
for the Ninth Circuit**

**PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,**

Appellant,

vs.

**RALPH E. WILLIAMS, Trustee in Bankruptcy
of JOHN E. DUSKIN, Formerly Known as
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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155 Montgomery Street,
San Francisco, California,

Attorneys for Appellee.

In the Southern Division of the United States District Court for the Northern District of California

No. 43333—In Bankruptcy

In the Matter of

JOHN E. DUSKIN, JR.,

Bankrupt.

CLAIM OF LIEN TO REAL PROPERTY AND
PROOF OF SECURED DEBT

United States of America,
Northern District of California,
County of Santa Clara—ss.

H. P. Stevens, being first duly sworn, deposes and says:

That he is an officer, to wit Vice President of Palo Alto Mutual Savings & Loan Association, a corporation (formerly Palo Alto Mutual Building & Loan Association, a corporation).

The above-named bankrupt was at and before the filing of the Petition in Bankruptcy herein, and is still, justly and truly indebted to said Palo Alto Mutual Savings & Loan Association in the sum of \$11,606.83, together with interest thereon at the rate of \$1.70 per day from March 18, 1955, together with \$500.00 attorneys' fees. That said indebtedness is computed as follows:

Balance principal	\$10,999.00
Interest through 3/18/55 at 5½%...	473.08
Recording Notice of Default	3.50
Insurance premium advanced	131.25
	<hr/>
	\$11,606.83
Total amount due.....	\$11,606.83
	<hr/> <hr/>

That said indebtedness is for money loaned as represented by a promissory note, photostatic copy of which is attached hereto, marked Exhibit "A" and made a part hereof. That said indebtedness is secured by a Deed of Trust executed by the Bankrupt above named, photostatic copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

That the lien created in favor of claimant is superior to all other liens against the property, save and except current and delinquent taxes due the County of Santa Clara, or any subdivision thereof.

/s/ H. P. STEVENS.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ CAROL B. HUGHES,
Notary Public in and for the County of Santa
Clara, State of California.

My commission expires February 13, 1959.

EXHIBIT A

Loan No. LA729

\$11,000.00

Los Altos, California, August 17, 1953.

For Value Received, the undersigned promise(s) to pay to Palo Alto Mutual Building and Loan Association, (a corporation), or order, at its office in Los Altos, California, or at such other place as the holder may designate, the principal sum of Eleven Thousand and no/100 Dollars (\$11,000.00) with interest from date at the rate of five and one-half per centum ($5\frac{1}{2}\%$) per annum on the balance remaining from time to time unpaid. Principal and interest shall be due and payable in advance in monthly installments of Seventy-seven and no/100 Dollars (\$77.00) commencing on the first day of March, 1954, and on the first day of each month thereafter until the principal and interest are fully paid. And we hereby covenant and agree that each installment when paid shall be applied by the holder thereof, first \$1.00 to dues on Installment Share Certificate No. 5722, then so much thereof as shall be required to pay interest due, and next the balance thereof to the repayment of the principal sum. All principal, interest and dues are payable in lawful money of the United States. In case of any default in the payment of any of said installments at the times and in the manner aforesaid, then such installments, so in default, shall bear interest from the date of their maturity until the date of payment

at the same rate of interest and shall compound monthly. At any time during such default of any installment or in any of the agreements contained in the deed of trust securing this note, the entire unpaid balance of said principal sum and interest shall, at the option of the holder of this note, and not otherwise, become immediately due and payable, of which election notice is hereby expressly waived, and the same shall thereafter bear interest at the same rate and be compounded monthly until paid.

The makers hereof reserve the privilege to repay this note in full upon the condition that if prepayment is made within 18 months from date, the makers hereof agree to pay, in addition to the balance due, a premium of $1\frac{1}{2}\%$ of the original amount of this note; or in the event prepayment is made after 18 months from date but within 36 months from date, the makers hereof agree to pay in addition to the balance due a premium of 1% of the original amount of this note.

This note is secured by a deed of trust of even date herewith.

/s/ JOHN E. DUSKIN, JR.,

/s/ GERTRUDE L. DUSKIN.

EXHIBIT B

Loan No. LA729

Book 2708, Page 187

908999

This Deed of Trust, made this Seventeenth day of August, A.D. one thousand nine hundred and fifty-three. By and Between John E. Duskin, Jr., and Gertrude L. Duskin, his wife, as trustor, grantor, and Lorenz Costello & Kenneth A. Johnson as trustees, and the Palo Alto Mutual Building and Loan Association, a corporation, as lender.

Witnesseth: Whereas, the trustor has borrowed and received of the lender, in lawful money of the United States the sum of Eleven Thousand and no/100 (\$11,000.00) Dollars, and in consideration of such loan the trustor has agreed to repay the same with interest, to the lender, or its order, in like money, according to the terms of a certain promissory note of even date herewith, executed and delivered for the sum of \$11,000.00 by the trustor to the lender;

Now, This Indenture Witnesseth: That the trustor, in consideration of the premises and of the aforesaid indebtedness to the lender, and of One Dollar to the trustor in hand paid by the trustees, the receipt whereof is hereby acknowledged, and for the purpose of securing the payment of said promissory note, and of any sum or sums of money, with the interest thereon, that may be paid or advanced

by or may otherwise be due to the trustees or lender, under the provisions of this instrument, and also such additional sums as may be hereafter loaned by the lender or its successor to the trustor or any of them, or any successor in interest of the trustor, with interest thereon and evidenced by another promissory note of the said trustor, or any successor in interest of the trustor, as granted, bargained, sold, conveyed, and confirmed, and does hereby grant, bargain, sell, convey and confirm unto said trustees, in joint tenancy and to the survivor of them, their successors and assigns, all that property situate in the County of Santa Clara, State of California, and described as follows:

Lot 15 as shown on the Map of Tract No. 1014 Bountiful Lands, filed for record June 1, 1953, in Book 42 of Maps, page 56, Santa Clara County Records.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

And, Also, all the estate, right, title and interest, homestead or other claim or demand, as well in law as in equity, which the trustor now has or may hereafter acquire of, in and to the said premises, with the appurtenances:

To Have and to Hold the same to the trustees, and to their successors and assigns, upon the trusts and confidences hereinafter expressed, to wit:

First.—During the continuance of these trusts, the lender and trustees or either of them, their successors and assigns, are hereby authorized to pay, without previous notice, all taxes, assessments and liens now subsisting or which may hereafter be imposed, by National, State, County, City, or other authority, or which may appear *prima facie* to subsist or be imposed upon said premises, to whomsoever assessed, and all or any incumbrances now subsisting or that may hereafter subsist thereon, which may, in their judgment affect said premises, or these trusts, at such time as in their judgment they may deem best; or, in their discretion, for the benefit and at the expense of the trustor, to contest the payment of any such taxes, assessments, liens or incumbrances, or defend any suit or proceeding instituted for the enforcement thereof; and it is expressly covenanted and agreed that the trustor will pay all or any taxes or assessments on the money which is or may be loaned hereunder, and on the instrument and the property hereby covered and obligation and obligations hereby secured; and in default thereof, the lender may at its option, without demand or notice, pay or satisfy such taxes or assessments, and pay and expend such sums of money as it may deem necessary therefor, and the amount thereof shall be repaid by the trustor to the lender upon demand, with interest thereon at rate provided in note hereby secured, and the amount thereof so expended by the lender shall be deemed secured by these presents until so repaid; and, in like manner, the lender is authorized to prosecute

or defend any suit or proceeding that it may consider proper to protect the title to said premises; and to keep the buildings and improvements now erected, or which may hereafter be erected, on said premises, insured against loss or damage by fire and other hazards as may be required and for such amounts and for such periods as may be required by the lender, with such company or companies as the lender may deem proper, loss, if any, payable to the lender; and these trusts shall be and continue as security to the lender and trustees, and their successors and assigns, for the repayment, in said lawful money, of the moneys so borrowed by the trustor, and the interest thereon, and of all amounts so paid out, and costs and expenses (including counsel fees) incurred as aforesaid, whether paid by the trustees or lender, with interest on such payments at rate provided in note hereby secured, until final payment, which disbursements and interest the trustor hereby agrees to pay.

It is understood and agreed that any and all insurance, of whatsoever kind and nature and in whatever amount, which may be taken out upon the improvements on said property, or any part thereof, shall be made, loss, if any, payable to the lender, and this clause shall constitute an irrevocable authority for the lender to collect, in case of loss, any and all proceeds of such insurance.

The Trustor agrees with respect to said property (a) property to care for and keep the same and the

improvements thereon in good condition and repair; (b) to complete in good and workmanlike manner any building which may be constructed thereon and to pay, when due, all claims for labor performed and materials furnished therefor, (cessation of work for a period of thirty (30) days on any unfinished improvement shall be deemed a default in the performance on part of the trustor), (c) not to remove or demolish any building thereon unless the consent of the Beneficiary is first had and obtained.

Secondly.—In case the trustor shall well and truly pay, or cause to be paid, at maturity, in lawful money as aforesaid, all sums of money, so borrowed as aforesaid, and the interest thereon, and shall, upon demand, repay all other moneys secured or intended to be secured hereby, and also the reasonable expenses of this trust, then the trustees, their successors or assigns, shall reconvey all the estate in the premises aforesaid to them by this instrument granted, unto the said trustor, his heirs and assigns, at his request and cost.

Thirdly.—If default shall be made in the payment of any of said sums of principal or interest or any part thereof when due, in the manner stipulated in said promissory note . . . , or in the reimbursement of any amounts herein provided to be paid, or of any interest thereon, or default be made in the performance on the part of the trustor, of any of the obligations in this instrument by him agreed to be kept and performed, then the lender, its successors or assigns, may elect to declare all

sums hereby secured to be immediately due and payable, and to cause the property hereby granted to be sold in order to accomplish the objects of these trusts; and, upon such election, shall record in the office of the Recorder of the County wherein the aforesaid granted premises or some part thereof are situated a notice of such breach or default, and of such election to sell said property, and after three months shall have elapsed following the recordation of said notice by the lender the trustees, their successors or assigns, on demand by the lender, or its assigns, and without demand on the trustor, shall sell said property or such part thereof as in their discretion they shall find necessary to sell in order to accomplish the objects of these trusts, having first given notice of the time and place of such sale in the manner and for the time, not less than that required by law, for sales of real property upon execution.

The Trustees may, from time to time, postpone such sale by such publication as they may deem reasonable, or without such publication, by proclamation made to the persons assembled, if any, at the time and place previously appointed and advertised for such sale; and on the day of sale so advertised, or to which such sale may be postponed, they may sell the property so advertised, or any portion thereof at public auction, in the county where any part of said property may be situated, to the highest cash bidder, and the holder or holders of said promissory note...., their agents or assigns, or any

member or director of said lender, may bid and purchase at such sale.

Said trustees may sell said above-described premises as a whole, or, in their discretion in such reasonable parcels or subdivisions as they in their judgment may deem advisable, and in conducting the sale they may act themselves or through the agency of an auctioneer or agent.

And the trustees, their successors or assigns, shall establish as one of the conditions of such sale that all bids and payments for said property shall be made in like lawful money as aforesaid and upon such sale they shall make, execute, and after due payment made, shall deliver to the purchaser or purchasers, his or their heirs and assigns, a deed or deeds of all interest derived to them hereunder in and to the premises so sold, being hereby expressly authorized to convey said premises in pursuance of the trusts herein set forth, and out of the proceeds thereof shall pay:

First.—The expenses of such sale, together with the reasonable expenses of this trust, including reasonable counsel fees in connection with sale, in lawful money, which shall become due upon any default made by the trustor in any of the payments aforesaid.

Second.—All sums which may have been paid, under or in accordance with the provisions hereof, by the lender, or the trustees, their successors or assigns, or the holders of the note . . . aforesaid, and

not reimbursed, and which may then be due, whether paid on account of incumbrance or insurance as aforesaid, or in the performance of any of the trusts herein created, together with any additional sums borrowed as aforesaid, and with whatever interest may have accrued thereon; next, the amount due and unpaid on said promissory note. . . ., with whatever interest may have accrued thereon, and lastly the balance or surplus of such proceeds, if any, to the person or persons legally entitled thereto.

And, in the event of a sale of said premises, or any part thereof, and the execution of a deed or deeds therefor, under these trusts, then the recitals therein of default and the giving of notice of sale, and of a demand by the lender, its successors or assigns, that such sale should be made, shall be conclusive proof of such default and of the due giving of such notice, and that the sale was made on due and proper demand by the lender, its successors or assigns; and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against the said trustor, his heirs or assigns, and all other persons as to such default, notice and demand; and the receipt for the purchase money contained in any deed executed to a purchaser, as aforesaid, shall be a sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money, according to the trusts aforesaid and the trustor upon the delivery of such deed or deeds hereby agrees to surrender,

immediately and without demand, possession of said property to such purchaser.

It is further expressly covenanted and agreed that, in case default be made in any of the payments as hereinabove mentioned, the said trustees, or the survivor of them, their successors or assigns, shall be entitled, at any time, at their option, either by themselves or by a receiver to be appointed by a court therefor, to enter upon and take possession of the above-granted premises, or any part thereof, and to do and perform such acts of repair or cultivation as may be necessary or proper to conserve the value thereof, and to collect and receive the rents, issues and profits thereof, and apply the same in the manner herein specified in respect to the proceeds of any sale of said premises, and, if action to enforce the provisions hereof shall be instituted, to exercise such other powers in respect to said premises as the court in which said suit is pending may direct; and the expenses there incurred, and also all expenses incurred by the lender in and about the making of the loan hereby secured, including counsel fees, shall be deemed to be a portion of the expense of this trust and secured thereby, as herein provided.

Acceptance by the lender of any sum in payment of any indebtedness secured hereby, after the date when the same is due, shall not constitute a waiver of the right either to require prompt payment, when due, of all other sums so secured, or to declare default, as herein provided, for failure so to pay; and

the lender may, after recording said notice of breach and election, waive or withdraw the same, or any proceedings thereunder, and shall thereupon be restored to its former position, and have and enjoy the same rights as though such notice had not been recorded.

As additional security, Trustor hereby gives to and confers upon lender the right, power and authority, during the continuance of these Trusts, to collect the rents, issues and profits of said property, reserving unto Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby or in performance of any agreement hereunder, to collect and retain such rents, issues and profits as they become due and payable. Upon any such default, lender may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby and in such order as lender may determine. The entering upon and taking possession of said property, the collection of such rents, issues and profits and the application thereof as aforesaid, shall not cure or waive any default or notice of default here-

under or invalidate any act done pursuant to such notice.

It is expressly covenanted that the lender may, by resolution of its Board of Directors, from time to time, appoint another trustee or other trustees to execute the trusts hereby created; and upon such appointment, the new trustee or trustees shall be vested with all the title, interest, powers, duties and trusts in the premises hereby vested in or conferred upon the trustees. Such new trustee or trustees shall be considered the successor or successors and assigns of the trustees within the meaning hereof.

A copy of such resolution, certified by the Secretary of the lender, under its corporate seal, shall be recorded in the office of the County Recorder of the County where the above-described real property is situated, and shall be conclusive proof of the proper appointment of such substituted trustee or trustees, or the authority of such substituted trustee or trustees may be evidenced by a conveyance to him or them by the trustee or trustees in whose place he or they have been appointed.

The trusts herein contained are irrevocable by the trustor. In the event of the sale of said premises, or any part thereof, without the written consent of the lender the entire balance of the principal and interest then remaining due, shall become immediately due and payable without notice.

The words "Trustor," "Grantor" and "Lender" wherever used in this instrument, shall, unless

otherwise specified, include the plural as well as the singular; if there is more than one trustor, the trustors' undertakings are joint and several; all provisions as to the "trustee" shall apply to the trustees when more than one, and to successors and assigns of the "trustee" exactly as if the words "successors and assigns" followed the word "trustee" in each instance; but if there be more than one trustee, either may act alone and execute said trusts, upon request of the lender, and all his acts hereunder shall be deemed to be the acts of all trustees, and the recital in any conveyance executed by such sole trustee of such request shall be conclusive evidence thereof and of the authority of such sole trustee to act.

The trustor hereby admits having received full notice that the trustees are now, or may hereafter become, stockholders or officers, or both, of the said lender and hereby consents that they, or such other stockholders or officers of said lender as may be substituted for either of them, may act as such trustees, and hereby waive all objections thereto.

In accordance with Sec. 2924b, Civil Code, the trustor hereby requests that a copy of any notice of default and a copy of any notice of sale under this deed of trust be mailed to trustor at the address given hereinafter.

In Witness Whereof, the said trustors have hereunto set their hands and seals the day and year first above written.

Signature of Trustor:

[Seal] /s/ JOHN E. DUSKIN, JR.,

[Seal] /s/ GERTRUDE L. DUSKIN.

Mailing address for notices of default and sale:

John E. Duskin, Jr.,

1036 Miramonte Ave., Mountain View, Cal.

Gertrude L. Duskin,

1036 Miramonte Ave., Mountain View, Cal.

State of California,

County of Santa Clara—ss.

On this 18th day of August, in the year one thousand nine hundred and fifty-three, before me, Phyllis B. Ohler, a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared John E. Duskin, Jr. and Gertrude L. Duskin known to me to be the persons described in, and who executed and whose names are subscribed to the within and foregoing instrument, and acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ PHYLLIS B. OHLER,

Notary Public in and for Said County of Santa Clara, State of California.

My commission expires 12/21/55.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

CLAIM OF LIEN TO REAL PROPERTY AND
PROOF OF SECURED DEBT

United States of America,
Northern District of California,
County of Santa Clara—ss.

H. P. Stevens, being first duly sworn, deposes and says:

That he is an officer, to wit, Vice President of Palo Alto Mutual Savings & Loan Association, a corporation (formerly Palo Alto Mutual Building & Loan Association, a corporation).

The above-named Bankrupt was at and before the filing of the Petition in Bankruptcy herein, and is still, justly and truly indebted to said Palo Alto Mutual Savings & Loan Association in the sum of \$11,755.02, together with interest thereon at the rate of \$1.70 per day from March 18, 1955, together with \$500.00 attorneys' fees. That said indebtedness is computed as follows:

Balance principal	\$10,999.00
Interest through 3/18/55 at 5½%...	692.02
Recording Notice of Default	3.50
Insurance premium advanced	60.50
	<hr/>
	\$11,755.02
Total amount due	<u>\$11,755.02</u>

That said indebtedness is for money loaned as represented by a promissory note, photostatic copy

of which is attached hereto, marked Exhibit "A" and made a part hereof. That said indebtedness is secured by a Deed of Trust executed by the Bankrupt above named, photostatic copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

That the lien created in favor of claimant is superior to all other liens against the property, save and except current and delinquent taxes due the County of Santa Clara, or any subdivision thereof.

/s/ H. P. STEVENS.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ CAROL B. HUGHES,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires February 13, 1959.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

CLAIM OF LIEN TO REAL PROPERTY AND
PROOF OF SECURED DEBT

United States of America,
Northern District of California,
County of Santa Clara—ss.

H. P. Stevens, being first duly sworn, deposes and says:

That he is an officer, to wit Vice President of Palo Alto Mutual Savings & Loan Association, a corporation (formerly Palo Alto Mutual Building & Loan Association, a corporation).

The above-named Bankrupt was at and before the filing of the Petition in Bankruptcy herein, and is still, justly and truly indebted to said Palo Alto Mutual Savings & Loan Association in the sum of \$11,720.98, together with interest thereon at the rate of \$1.70 per day from March 18, 1955, together with \$500.00 attorneys' fees. That said indebtedness is computed as follows:

Balance principal	\$10,999.00
Interest through 3/18/55 at 5½%...	587.23
Recording Notice of Default	3.50
Insurance premium advanced	131.25

11,720.98

Total amount due.....\$11,720.98

That said indebtedness is for money loaned as represented by a promissory note, photostatic copy of which is attached hereto, marked Exhibit "A" and made a part hereof. That said indebtedness is secured by a Deed of Trust executed by the Bankrupt above named, photostatic copy of which is attached hereto, marked Exhibit "B" and made a part hereof.

That the lien created in favor of claimant is superior to all other liens against the property, save

and except current and delinquent taxes due the County of Santa Clara, or any subdivision thereof.

/s/ H. P. STEVENS.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ CAROL B. HUGHES,
Notary Public in and for the County of Santa Clara, State of California.

My commission expires February 13, 1959.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

TRUSTEE'S OBJECTIONS TO PROOFS OF
SECURED CLAIMS OF PALO ALTO MU-
TUAL SAVINGS & LOAN ASSOCIATION

Comes now Ralph E. Williams, and respectfully represents:

That he is the duly appointed, qualified and acting Trustee of the estate of the Bankrupt above named, and hereby objects to the allowance by the above-entitled Court of those certain Proofs of Secured Claims heretofore filed herein by Palo Alto Mutual Savings & Loan Association in the sum of Twelve Thousand Two Hundred Twenty Dollars and Ninety-eight (\$12,220.98) Cents, and Twelve Thousand One Hundred Six Dollars and Eighty-three (\$12,106.83) Cents, insofar as said proofs of

secured claims claim interest on the principal sum from and after the 14th day of July, 1954, the date of the filing of the original Petition in Bankruptcy herein, for recording charges, and for attorneys' fees.

Wherefore, said Trustee prays that his foregoing Objections to each of said Proofs of Secured Claims of said Palo Alto Mutual Savings & Loan Association be by this Court sustained, and that said claims be disallowed insofar as they claim interest after the said 14th day of July, 1954, recording charges and attorneys' fees; and for such other and different order as to this Court may seem just and proper in the premises.

RALPH E. WILLIAMS,
Trustee;

By /s/ DANIEL ARONSON, JR.,
One of His Attorneys.

Duly verified.

[Endorsed]: Filed April 22, 1955.

[Title of District Court and Cause.]

ORDER SUSTAINING TRUSTEE'S OBJEC-
TIONS TO PROOFS OF SECURED
CLAIMS OF PALO ALTO MUTUAL SAV-
INGS & LOAN ASSOCIATION

The Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan As-

sociation, together with the Order to Show Cause thereon issued by the above-entitled Court on the 22nd day of April, 1955, together with the Answer thereto of said Palo Alto Mutual Savings & Loan Association, having regularly come on for hearing before the above-entitled Court on the 4th day of May, 1955, said Trustee being represented by Messrs. Shapro & Rothschild (Daniel Aronson, Jr., Esq., appearing), his attorneys, and said Palo Alto Mutual Savings & Loan Association being represented by Messrs. Costello & Johnson (Lorenz Costello, Esq., appearing), its attorneys, and testimony having been introduced by said Trustee in support of said Objections, and by Claimant in opposition thereto, and the matter having been submitted for decision and the Court being fully advised in the premises, Finds:

1.

That each and all of the allegations contained in Paragraphs I, II, III and IV of said Claimant's Answer to Order to Show Cause are True.

2.

That each and all of the allegations contained in Paragraphs V, VI and VII of said Claimant's Answer to Order to Show Cause are untrue.

3.

That on the date of the filing of the original Petition in Bankruptcy herein, to wit, the 14th day of July, 1954, there was due under the Deed of Trust for which Parcel 1 was security, the principal

sum of Ten Thousand Nine Hundred Ninety-nine (\$10,999.00) Dollars, together with interest thereon at the rate of five and one-half per cent ($5\frac{1}{2}\%$) per annum in the sum of Fifty-four Dollars and Eighty-eight (\$54.88) Cents, together with the cost of insurance premium advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five (\$131.25) Cents, or a total of Eleven Thousand One Hundred Eighty-five Dollars and Thirteen (\$11,185.13) Cents, and on the Deed of Trust for which Parcel 2 herein was security, the principal sum of Ten Thousand Nine Hundred Ninety-nine (\$10,999.00) Dollars, together with interest thereon at the rate of five and one-half per cent ($5\frac{1}{2}\%$) per annum in the sum of One Hundred Sixty-nine Dollars and Three (\$169.03) Cents, together with the cost of insurance premium advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five (\$131.25) Cents, or a total of Eleven Thousand Two Hundred Ninety-nine Dollars and Twenty-eight (\$11,299.28) Cents, and that as to both of said Deeds of Trust interest accrues at the rate of One Dollar and Seventy (\$1.70) Cents per day from the said 14th day of July, 1954.

4.

That no notice of default and election to sell was executed and recorded by said Claimant until August 27, 1954.

5.

That both Parcels 1 and 2 were sold by said Trustee for a sum sufficient to pay the principal sum,

together with interest thereon to date of payment due under the respective deeds of trust on said property, plus the costs of sale, but for a sum insufficient to pay in full the second deeds of trust thereon.

Wherefore, the Court Concludes:

That it is bound by the decision in *Beecher vs. Leavenworth State Bank*, 192 F. 2d. 10 (9th Cir., 1951), and by the decision *In Re California Constructors, Inc., Bankrupt*, No. 38991 in the records and files of this Court, dated June 10, 1953, to the effect that, as under the circumstances set forth in this case, interest stops on both secured and unsecured claims upon the date of the filing of the Petition in Bankruptcy (*Sexton vs. Dreyfus*, 219 U.S. 339, 55 L. Ed. 244), and

That the rights of all parties as to the non-exempt property of a Bankrupt become fixed as of the date of the filing of the Petition in Bankruptcy, and that a creditor cannot be compensated for costs and attorneys' fees incurred for steps taken to foreclose a claim against said property after the date of the filing of the original Petition in Bankruptcy, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that said Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association be, and the same are hereby sustained, and that said Proofs of Secured Claims be, and they are hereby disallowed insofar as they claim interest on

the obligations of deeds of trust more particularly herein described after the 14th day of July, 1954, and for costs advanced, attorneys' fees and recording charges.

Dated at San Jose, in said District, this 18th day of May, 1955.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed May 18, 1955.

[Title of District Court and Cause.]

PETITION FOR REVIEW

Pursuant to Section 39(c) of the Bankruptcy Act, and laws applicable thereto, Palo Alto Mutual Savings and Loan Association (formerly Palo Alto Mutual Building and Loan Association) hereby petitions for a review by a Judge of the above-entitled Court, of the Referee's order sustaining trustee's objections to proof of claims, which order was made and entered on the 18th day of May, 1955, and a copy of which order is attached hereto, marked Exhibit "A," and incorporated herein by reference.

The errors in respect to said order are as follows:

Errors in Conclusions

1. The order is contrary to law, as set forth and established by the Supreme Court of the United States:

Sexton vs. Dreyfus,

219 U. S. 339, 55 L. ed. 244 (1911)

Louisville Joint Stock Land Bank vs. Radford (1935) 295 U. S. 555, 79 L. ed. 1593

Vanston Bond Holders vs. Green,

329 U. S. 156, 91 L. ed. 162 (1946)

(A) Of the reported cases, the order cites Beecher vs. Leavenworth State Bank, 192 F. (2d) 10 (9th Cir., 1951); Sexton vs. Dreyfus (*supra*), and In Re California Constructors, Inc., Bankrupt, No. 38991, in the records and files of this Court, and holds that in the present case interest on the secured claim (as well as on unsecured claims) stops on the date of filing of the petition.

This is not the law where there is a sale of the security free and clear of liens, the security by its terms includes the payment of interest, and the sale proceeds are sufficient to pay both principal and interest. These factors were not present in either the Beecher or Sexton cases.

The Supreme Court on at least two later occasions had distinguished the Sexton case on this very point.

In Sexton vs. Dreyfus (*supra*) creditors holding pledged securities sold the same after the bankrupt had filed, realizing not enough to pay even the principal secured. They attempted then to pay themselves interest first, the remainder on principal, and to prove the balance as general creditors against

the estate. No question arose as to what would be the rule if the proceeds were sufficient to cover both principal and interest—and obviously not, as there would then be no question of proving interest accruing after filing as a general creditor—as the creditors were attempting to do by indirection. Thus rightfully the rule as to interest stopping on unsecured claims was followed.

Twenty-four years later this same Supreme Court (Louisville Joint Stock Land Bank vs. Radford, *supra*) denounced the contention that interest on secured as well as unsecured claims ceases with the filing of the petition, where the situation deals with a sale free of liens, stating (footnote 31):

“But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. *Sexton vs. Dreyfus*, 219 U. S. 339, 55 L. ed. 244, 31 S. Ct. 256, 25 Am. Bankr. Rep. 363. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens.”

Thirty-five years after the *Sexton* Case, the Supreme Court decided *Vanston Bond Holders vs. Green*, 329 U.S. 156, 91 L. ed. 162 (1946). Here the sales proceeds were sufficient to pay principal and interest. In allowing interest to date of payment (but disallowing interest on that interest), again

the Supreme Court interprets the meaning of the Sexton Case, saying, on page 164:

“Simple interest on secured claims accruing after the petition was filed was denied unless the security was worth more than the sum of principal and interest due. *Sexton v. Dreyfus* (U.S.) *supra*.”

(Other excellent cases, including *Oppenheimer vs. Oldham*, 178 F. (2) 386, 1949 (C.A., 5th Tex.), and in *Re Gotham Can Co.* (1931) (C.A., 2nd N.Y.), 48 F. (2) 540, also carry clear discussions of the true application of the Sexton Case, but under this particular assignment of error we prefer to rely on the Supreme Court's own interpretation of its own case.)

(B) Neither the Referee nor the above-entitled District Court is in any sense of the word “bound” by the *Beecher Case* if in fact it reaches a legal conclusion contrary to the Supreme Court.

2. The order is contrary to the law obtaining in all other circuits of the United States which have handled this particular question:

Kagen vs. Industrial Washing Machine Co.
(1950), 182 F. (2) 139, 146. (1st Cir.)

Re Gotham Can Co.
(1931), 48 F. (2d) 540. (2nd Cir.)

Re Torchia
(1911), 185 F. 576, 188 F. 207. (3rd Cir.)

Littleton vs. Kincaid,

179 F. (2) 848, 852. (4th Cir.)

United States vs. Paddock,

187 F. (2d) 271. (5th Cir.)

Re Macomb Trailer Coach, Inc.

(1953), 200 F. (2) 611. (6th Cir.)

In Re Chicago R. I. & P. Ry. Co.,

155 F. (2) 889, 892. (7th Cir.)

Wilson vs. Dewey

(1943), 133 F. (2) 962 (Deed of Trust.)
(8th Cir.)

United States vs. Sampsell

(1946), 153 F. (2) 731. (9th Cir.)

In Re Deep Rock Oil Co.,

113 F. (2d) 266, 269 (1940). (10th Cir.)

In Re Fabacher, D.C.E.D.,

193 F. 556. (D.C.)

3. The order is contrary to law since the facts of this proceeding do not make the decision of Beecher vs. Leavenworth State Bank (*supra*) either controlling or applicable at all:

In the Beecher Case, creditors of Beecher held mortgages on his property. In April, 1939, they purchased the property at sheriff's sale after obtaining judgments of foreclosure in a Washington State Court. This constituted their "security" when, on February 1, 1940, Beecher filed in bankruptcy. There was no sale of the security in the bankruptcy

free and clear of liens, but an order allowing claims pursuant to Sec. 75 of the Act, which order disallowed interest on the debts after date of filing.

The Court discussed (pg. 13) two exceptions to the rule stopping interest—apparently those exceptions applying to that exact case—and went on to say:

“Except as stated above, the only time in which a majority of modern cases have allowed interest after bankruptcy on secured claims is when the Courts have discovered equitable reasons for doing so. *Vanston, etc., Committee vs. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L. ed. 162 * * *”

At this point it is particularly important to remember that in the *Vanston Case* the security proceeds were sufficient to pay the interest, and the simple interest was allowed after bankruptcy (see discussion under point (1), our Specifications of error).

The bald distinction is thus apparent. The *Beecher Case* contains no evidence—no discussion—of whether any sales proceeds were or were not sufficient. Therefore, the reason for not going into the third exception to the rule save citing the *Vanston Case* in passing.

The policy basis of the *Beecher Case* might well be the regulations of Sec. 75—where the farmer-debtor is put into possession of his encumbered

property and allowed to operate his farm "out of debt" over a number of years.

Such is not the case where the bankruptcy court, without being required to wait many years, sells property free and clear of liens, as in the matter at hand.

The Supreme Court denied certiorari in the Beecher Case (343 U.S. 953, 96 L. ed. 1354, id., 344 U.S. 886). Two years later (May 18, 1953) the same Supreme Court denied certiorari in the case of Weeks vs. McInnis (id., in re Macomb Trailer Coach, Inc., 200 F. (2) 611 (6th Cir., 1953), cert. den. 345, U.S. 958.

In the Weeks Case a sale was ordered and made free and clear of liens, and not a proceeding pursuant to Sec. 75, et seq., of the Bankruptcy Act. The facts of the case showed the sales proceeds of the security were sufficient to pay interest to date of payment of principal, and this was allowed. Since the Weeks decision discussed the Beecher Case and considered it not applicable, the Supreme Court in denying certiorari in Weeks vs. McInnis must be assumed to have considered the striking difference between the two cases in allowing each to stand. Any other conclusion is untenable.

Secondly, the Beecher Case in no way mentions or discusses that interest after Bankruptcy was a part of the lien for security under Washington State Law. Although this may not be controlling (see Vanston, etc., Committee vs. Green, cited

supra), it is certainly persuasive in that under California Law the lien of a trust deed extends to the payment of interest where by the terms of the note and deed of trust it is so declared. (In re Haacke (D.C., Cal.) (2) Sawy 231, F. cas. No. 5583: Such interest is a part of the "sum for which the property is held as security.")

Oppenheimer vs. Oldham (1949, C.A., 5th), 178 F. (2) 386, was a Texas first deed of trust case where the security was sold by the bankruptcy court free and clear of liens, and the proceeds being sufficient to pay interest to date of payment of principal, interest was paid. After referring to the *Vanston Case* as authority for allowing such interest, the case goes on to make much of the rule that:

"It has always been a fundamental principle of the bankruptcy law that the property rights and interests designed as liens and pledges, when valid in bankruptcy, shall not be impaired in the administration of a bankrupt estate,

4. The order fails to take into consideration the additional equities arising when claimant, at a time when bankrupt was in default and a breach could be declared, instead, at trustee's special instance and request, advanced additional funds after the adjudication to complete the home, the order holding that no interest can be allowed on these amounts either.

Pertinent Facts Not Mentioned in Findings
Effecting Jurisdiction

That the property referred to in Referee's Order Sustaining Trustee's Objection to Proofs of secured claims of Palo Alto Mutual Savings and Loan Association designed as Parcel I as security of the principal sum of \$10,999.00 and Parcel II as security of the principal sum of \$10,999.00, as loans executed by John E. Duskin, Jr. (the bankrupt herein) and Gertrude L. Duskin, his wife, dated August 17, 1953, and recorded August 24, 1953, in Book 2708 of Official Records of Santa Clara County at Pages 183 and 187 respectively. That at the time of the execution of said deeds of trust which were given as security for construction loans, the said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, possessed title to the said security as joint tenants. That Gertrude L. Duskin has never been adjudicated a bankrupt, and since the adjudication of John E. Duskin, Jr., John E. Duskin, Jr., has become deceased. That by reason of title being in the name of Gertrude L. Duskin, the Bankruptcy Trustee had no jurisdiction to sell the half interest of Gertrude L. Duskin, nor the total interest by reason of the death of John E. Duskin, Jr.; and not having jurisdiction or title or possession, no right to object to the payment of interest and attorneys' fees owing to the Palo Alto Mutual Savings and Loan Association.

Denial of Palo Alto Mutual Savings and Loan Association Claim for Interest on Their Secured Loans Is Contrary to Public Policy.

The Palo Alto Mutual Savings and Loan Association is a lending institution created under the laws of the State of California and regulated by both State and Federal laws, and accepts deposits from the public in anticipation of a fair return on their investment. That said Association, in addition thereto, has all of their accounts up to \$10,000.00 protected by Federal Agency Insurance. That said Association also has the privilege and does borrow money directly from Federal Government Agencies and is obligated thereunder to pay interest on said monies so borrowed by the Association. To deny the Association interest on monies advanced would be against public policy, as the Association is obligated under the law to protect the money of their investors and guarantee the payment of interest to them. To deny interest by the Bankruptcy Trustee would, in turn, jeopardize these public interests.

The Bankruptcy Estate as Far as Unsecured Creditors Are Concerned Is Not Affected by the Allowing or Disallowing of Interest on These Obligations.

Both of the properties referred to in this proceeding have been solely financed by the Association, and the holder of the second deed of trust; and by denying interest to the Association merely

benefits the holder of the second deed of trust who had full knowledge of the first encumbrance in favor of the Association. Any savings by the Bankruptcy Trustee will only result in an adjustment with the holder of the second deed of trust but will be of no benefit to the bankrupt estate.

Wherefore, Petitioner prays for a review of the above set forth Order pursuant to Section 39(c) of the Bankruptcy Act, and for a judgment and decree of the above-entitled Court setting aside the Referee's Order and/or modifying the same; overrule Trustee's objection to Petitioner's secured claims and allow Petitioner interest accruing on the principal sum from August 17, 1953, to and including date of actual payment of the principal sum due and owing to the Association; and for an Order decreeing that the Bankruptcy Trustee has no jurisdiction over the portion of the securities owned by Gertrude L. Duskin, who has not been decreed a bankrupt; and for such other relief as to the Court seems just.

PALO ALTO MUTUAL
SAVINGS & LOAN ASS'N,

By /s/ H. P. STEVENS,
Petitioner, Vice President.

Duly verified.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF REFEREE'S ORDER
SUSTAINING TRUSTEE'S OBJECTIONS
TO PROOFS OF SECURED CLAIMS OF
PALO ALTO MUTUAL SAVINGS & LOAN
ASSOCIATION

The undersigned, one of the Referees in Bankruptcy, in accordance with provisions of Section 39a of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings and Statement of Facts

That on July 14, 1954, an involuntary Petition in Bankruptcy was filed with the above-entitled Court against John E. Duskin, Jr., and on August 19, 1954, the said John E. Duskin, Jr., was adjudicated Bankrupt and the matter was referred to the undersigned Referee to take such further proceedings as may be required by the provisions of said Bankruptcy Act.

That on October 22, 1954, the undersigned made an order fixing the 5th day of November, 1954, at the hour of 10:00 o'clock a.m. for the First Meeting of Creditors. That on the said 5th day of November, 1954, the undersigned made an order appointing Ralph E. Williams, of the City of San Jose, Trustee of the said estate, and that thereafter and on the 8th day of November, 1954, the undersigned made an order approving said Ralph

E. Williams' bond as such Trustee, and that said Ralph E. Williams has been and still is the duly appointed, qualified and acting Trustee of said estate.

That on August 17, 1953, Palo Alto Mutual Savings & Loan Association, a corporation, loaned to John E. Duskin, Jr., and to Gertrude L. Duskin, his wife, the sum of Eleven Thousand Dollars (\$11,000.00), which loan was evidenced by a note at five and one-half per cent ($5\frac{1}{2}\%$) interest and which note was secured by a first deed of trust on the real property which is referred to herein as Parcel 1 and which deed of trust was recorded on August 24, 1953, in Book 2708 of Official Records of the Recorder of the County of Santa Clara, at page 187. Also on the same date, said Palo Alto Mutual Savings & Loan Association, a corporation, loaned to John E. Duskin, Jr., and Gertrude L. Duskin, his wife, the additional sum of Eleven Thousand Dollars (\$11,000.00), which loan was evidenced by a note at five and one-half per cent ($5\frac{1}{2}\%$) interest and which note was secured by a first deed of trust on the real property which is referred to herein as Parcel 2 and which deed of trust was recorded on August 24, 1953, in Book 2708 of Official Records of the Recorder of the County of Santa Clara, page 183.

That on March 15, 1955, said Palo Alto Mutual Savings & Loan Association filed with the above-entitled Court its Proof of Claim for which Parcel 1 was security in the sum of Twelve Thousand One

Hundred Six Dollars and Eighty-four Cents (\$12,106.84) and its Proof of Secured Claim for which Parcel 2 was security in the sum of Twelve Thousand Two Hundred Twenty Dollars and Ninety-eight Cents (\$12,220.98) (the original Proofs of Claim of Palo Alto Mutual Savings & Loan Association filed March 15, 1955, are forwarded herewith as part of this certificate).

That on March 18, 1955, Parcel 1 was sold by the Trustee of the above estate, after due notice to said secured creditor, free and clear of all liens and encumbrances for the gross sales price of Thirteen Thousand Eight Hundred Dollars (\$13,800.00). Prior to this time the Trustee had received no income whatsoever from this property. The net sales proceeds are sufficient to pay to Palo Alto Mutual Savings & Loan Association the principal sum, together with interest thereon, to the date of payment, together with additional advances, and a reasonable attorneys' fee. There are also as valid liens against the property the following: A second deed of trust which will receive only a partial payment and various mechanics lien claims which will receive nothing from the proceeds of the sale.

That on March 18, 1955, Parcel 2 was similarly sold by the Trustee of the above estate, free and clear of all liens and encumbrances for the gross sales price of Fourteen Thousand Three Hundred Dollars (\$14,300.00). Prior to this time the Trustee had received no income whatsoever from this property. The net sales proceeds are sufficient to

pay to Palo Alto Mutual Savings & Loan Association the principal sum, together with interest thereon to the date of payment, together with additional advances and a reasonable attorneys' fee. There are also as valid liens against the property the following: A second deed of trust which will receive only a partial payment and various mechanic lien claims which will receive nothing from the proceeds of the sale.

That on April 22, 1955, there was filed in these proceedings Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association; that on the said April 22, 1955, the undersigned made an order fixing May 4, 1955, at 2:00 o'clock p.m. as the time for the hearing of said Trustee's Objections; that on the said May 4, 1955, said Palo Alto Mutual Savings & Loan Association filed its Answer to Order to Show Cause (the original Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association filed April 22, 1955, the original Order to Show Cause thereon issued April 22, 1955, and the original Answer to Order to Show Cause filed May 4, 1955, are forwarded herewith as part of this certificate); that on May 17, 1955, the undersigned Referee made an Order Sustaining the said Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association (the original Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual

Savings & Loan Association filed May 17, 1955, is forwarded herewith as part of this certificate).

II.

Referee's Findings

1. That said Trustee has heretofore conceded that there is due under the deed of trust for which Parcel 1 was security the principal sum of Ten Thousand Nine Hundred Ninety-nine Dollars (\$10,999.00), together with interest thereon at the rate of five and one-half per cent ($5\frac{1}{2}\%$) per annum to the 14th day of July, 1954, the date of the filing of the original Petition in Bankruptcy herein, in the sum of Fifty-four Dollars and Eighty-eight Cents (\$54.88), together with the cost of insurance premiums advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five Cents (\$131.25) or an aggregate total of Eleven Thousand One Hundred Eighty-five Dollars and Thirteen Cents (\$11,185.13), and on the deed of trust for which Parcel 2 was security the principal sum of Ten Thousand Nine Hundred Ninety-nine Dollars (\$10,999.00), together with interest thereon at the rate of five and one-half per cent ($5\frac{1}{2}\%$) per annum to the 14th day of July, 1954, date of the filing of the original Petition in Bankruptcy herein, in the sum of One Hundred Sixty-nine Dollars and Three Cents (\$169.03.), together with the cost of insurance premiums advanced in the sum of One Hundred Thirty-one Dollars and Twenty-five Cents (\$131.25), or a total of Eleven Thousand Two

Hundred Ninety-nine Dollars and Twenty-eight Cents (\$11,299.28).

2. That each and all of the allegations contained in Paragraphs I, II, III, and IV of said Claimant's Answer to Order to Show Cause are true.

3. That each and all of the allegations contained in Paragraphs V, VI, and VII of Claimant's Answer to Order to Show Cause are untrue.

4. That no notice of default and election to sell was recorded by said Palo Alto Mutual Savings & Loan Association until August 27, 1954 (after bankruptcy).

5. That both Parcels 1 and 2 were sold by said Trustee for a sum sufficient to pay the principal sum, together with interest thereon to date of payment due under the respective deeds of trust on said property, plus the cost of sale, but for a sum insufficient to pay in full the second deed of trust thereon.

III.

Hearings

That at the time and place fixed for the hearing of said Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association, there appeared before the undersigned the following: Daniel Aronson, Jr., Esq., of Shapro & Rothschild, San Francisco, California, for the Trustee, and Lorenz Costello of Costello & Johnson, Palo Alto, California, for Palo Alto Mutual Savings & Loan Association.

Said matter was heard and considered by the undersigned upon the records and pleadings and upon the oral stipulation as to facts as hereinabove set forth.

On May 17, 1955, the undersigned made his Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association.

IV.

Statement of Questions Presented

1. That interest stops on both secured and unsecured claims upon the date of the filing of the Petition in Bankruptcy. This Court is bound by the decision in *Beecher vs. Leavenworth State Bank*, 192 F. 2d 10 (9th Cir., 1951) and by the decision in *In Re California Constructors, Inc., Bankrupt*, No. 38991 in the records and files of the above-entitled Court dated June 10, 1953, and *Sexton vs. Dreyfus*, 219 U. S. 339, 54 L. Ed. 244; and

2. That the rights of all parties as to the non-exempt property of a bankrupt become fixed as of the date of the filing of the Petition in Bankruptcy, and that a creditor cannot be compensated for costs and attorney's fees incurred for steps taken to foreclose a claim against said property after the date of the filing of the original Petition in Bankruptcy.

V.

Review

That on June 16, 1955, Palo Alto Mutual Savings & Loan Association filed the instant Petition for

Review of said Order Sustaining Trustee's Objections to Proofs of Secured Claims of Palo Alto Mutual Savings & Loan Association.

Dated in Oakland in said District this 4th day of August, 1955.

Respectfully submitted,

/s/ BERNARD J. ABROTT,

Referee in Bankruptcy.

[Endorsed]: Filed August 3, 1955, Referee.

[Endorsed]: Filed August 12, 1955, U.S.D.C.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is stipulated by the Trustee in Bankruptcy herein and claimant, Palo Alto Mutual Savings and Loan Association, through their respective counsel, that the petition for review filed herein by said Palo Alto Mutual Savings and Loan Association may be submitted to the Court for decision upon the following statement of facts:

On and prior to July 14, 1954 (the date of filing petition in bankruptcy herein) John E. Duskin, Jr. (bankrupt herein) and Gertrude L. Duskin, his wife, were the owners in joint tenancy of two parcels of real property in Santa Clara County, California, described throughout the within proceedings as Parcel 1 and Parcel 2.

On August 17, 1953, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, borrowed from Palo Alto Mutual Savings and Loan Association the sum of Ten Thousand Nine Hundred Ninety-nine and no/100 Dollars (\$10,999.00) evidenced by their promissory note, in writing, which provided for payment of interest at the rate of $5\frac{1}{2}\%$ per annum. To secure the payment of said sum, with interest thereon, as well as other sums advanced by the lender, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, executed and delivered their deed of trust to Palo Alto Mutual Savings and Loan Association, as beneficiary, covering the property designated herein as Parcel 1. Said deed of trust was recorded in the office of the County Recorder of Santa Clara County, California, on August 24, 1953, in Book 2708 of Official Records, page 183, Santa Clara County Records. Said deed of trust, at the time of recording, was and remains a first lien of record against the property herein designated as Parcel 1. The principal sum of \$10,999.00 borrowed by John E. Duskin, Jr., and Gertrude L. Duskin, his wife, as herein set forth, was used by them solely for the purpose of improving said real property described as Parcel 1 by the erection of a dwelling house thereon.

On July 14, 1954, there was due to Palo Alto Mutual Savings and Loan Association, under the terms of said promissory note and deed of trust, the sum of \$10,999.00 principal, together with interest thereon at the rate of $5\frac{1}{2}\%$ per annum in the sum

of \$54.88, together with the cost of insurance premium advanced by Palo Alto Mutual Savings and Loan Association in the sum of \$131.25, none of which sums have been paid.

Palo Alto Mutual Savings and Loan Association at all times since August 17, 1953, has been, and is now, the owner and holder of said promissory note and deed of trust.

Palo Alto Mutual Savings and Loan Association has duly filed its verified claim herein claiming the principal sum of said promissory note, with interest thereon to date of filing the petition in bankruptcy herein, accruing interest thereafter until paid, money advanced for insurance premiums, recording costs and attorneys' fees.

On August 17, 1953, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, borrowed from Palo Alto Mutual Savings and Loan Association the sum of Ten Thousand Nine Hundred Ninety-nine and no/100 Dollars (\$10,999.00) evidenced by their promissory note, in writing, which provided for payment of interest at the rate of $5\frac{1}{2}\%$ per annum. To secure the payment of said sum, with interest thereon, as well as other sums advanced by the lender, said John E. Duskin, Jr., and Gertrude L. Duskin, his wife, executed and delivered their deed of trust to Palo Alto Mutual Savings and Loan Association, as beneficiary, covering the property designated herein as Parcel 2. Said deed of trust was recorded in the office of the County Re-

corder of Santa Clara County, California, on August 24, 1953, in Book 2708 of Official Records, page 183, Santa Clara County Records. Said deed of trust, at the time of recording, was and remains a first lien of record against the property herein designated as Parcel 2. The principal sum of \$10,999.00 borrowed by John E. Duskin, Jr., and Gertrude L. Duskin, his wife, as herein set forth, was used by them solely for the purpose of improving said real property described as Parcel 2 by the erection of a dwelling house thereon.

On July 14, 1954, there was due to Palo Alto Mutual Savings and Loan Association, under the terms of said promissory note and deed of trust, the sum of \$10,999.00 principal, together with interest thereon at the rate of $5\frac{1}{2}\%$ per annum in the sum of \$169.03, together with the cost of insurance premium advanced by Palo Alto Mutual Savings and Loan Association in the sum of \$131.25, none of which sums have been paid.

Palo Alto Mutual Savings and Loan Association at all times since August 17, 1953, has been, and is now, the owner and holder of said promissory note and deed of trust.

Palo Alto Mutual Savings and Loan Association has duly filed its verified claim herein claiming the principal sum of said promissory note, with interest thereon to date of filing the petition in bankruptcy herein, accruing interest thereafter until paid, money advanced for insurance premiums, recording costs and attorneys' fees.

At the time of filing the petition in bankruptcy herein there existed second deeds of trust upon the real properties herein mentioned, and there existed of record against said real property various claims of lien of material men or other persons who had contributed labor or services to the real property in question. Said second deeds of trust and each and all the claims of lien were subsequent in time and right to the deeds of trust executed by said bankrupt in favor of Palo Alto Mutual Savings and Loan Association.

On the 18th day of March, 1955, the trustee herein, pursuant to an order of the Referee in Bankruptcy, sold the real property mentioned herein as Parcel 1, free and clear of liens, for a sum sufficient to pay the principal sum amount due Palo Alto Mutual Savings and Loan Association under its deed of trust on said parcel, together with interest on said principal sum, as provided by the promissory note for which said deed of trust was given as security, to the date of sale and insurance premiums advanced by Palo Alto Mutual Savings and Loan Association.

On the 18th day of March, 1955, the trustee herein, pursuant to an order of the Referee in Bankruptcy, sold the real property mentioned herein as Parcel 2, free and clear of liens, for a sum sufficient to pay the principal amount due Palo Alto Mutual Savings and Loan Association under its deed of trust on said parcel, together with interest on said principal sum, as provided by the

promissory note for which said deed of trust was given as security, to the date of sale and insurance premiums advanced by Palo Alto Mutual Savings and Loan Association.

Subsequent to the sales above noted the trustee herein filed objections to the proofs of secured claims of Palo Alto Mutual Savings and Loan Association insofar as said claims applied to interest after the 14th day of July, 1954, recording charges and attorneys' fees. Said objections were sustained by the Referee in Bankruptcy.

In connection with the said claims of Palo Alto Mutual Savings and Loan Association the trustee refuses to pay claimant any sum or sums in excess of the principal amounts of said claims together with interest on said principal amounts to the date of filing petition in bankruptcy herein, and insurance premiums advanced by Palo Alto Mutual Savings and Loan Association.

It is further stipulated between the parties hereto that the Palo Alto Mutual Savings and Loan Association is a savings and lending institution created under the laws of the State of California and subject to the rules and regulations of the Building and Loan Commissioner of the State of California; and is subject to the laws and statutes of the United States of America regulating such lending institutions and subject to the rules, regulations and privileges afforded by Federal agencies empowered

by law to govern the operations of such savings and lending institutions.

Attached hereto as a part of this stipulation and marked "Exhibits 1 and 2" are photostatic copies of the two deeds of trust referred to herein.

Dated this 14th day of November, 1955.

LORENZ COSTELLO and
CLARENDON W. ANDERSON,
Attorneys for Palo Alto Mutual
Savings & Loan Association,

By /s/ LORENZ COSTELLO.

SHAPRO & ROTHCHILD,
Attorneys for Trustee,

By /s/ DANIEL ARONSON, JR.

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It Is Further Stipulated by and between the Trustee in Bankruptcy herein and the claimant, Palo Alto Mutual Savings and Loan Association, through their respective counsel, that on the 18th day of March, 1955, the Trustee herein, pursuant to an Order of the Referee in Bankruptcy, sold the real property mentioned in the original Stipulation as Parcel 1 and Parcel 2 free and clear of liens for a sum sufficient to pay the principal amounts due the Palo Alto Mutual Savings and Loan Association under its respective deeds of trust on said par-

cels, together with interest on said principal sums, as provided by said promissory notes for which said deeds of trust were given as security, to the date of sale, including insurance premiums advanced by the Palo Alto Mutual Savings and Loan Association.

The Referee in Bankruptcy sustained the Trustee's objection insofar as allowing interest on said promissory notes and deeds of trust after July 14, 1954 (the date of adjudication) is concerned.

It is further stipulated between the parties hereto that even though the interest were withheld after the date of adjudication, such interest withheld after the date of adjudication would not be available to the general unsecured creditors but would be applied to the holder of the second deeds of trust on the respective properties who, in each case, were also the purchasers at the Trustee's sale of the respective properties.

Dated: December 9, 1955.

LORENZ COSTELLO,
CLARENDON W. ANDERSON,
FABER L. JOHNSTON, JR.,
Attorneys for Palo Alto Mutual
Savings & Loan Association,

By /s/ LORENZ COSTELLO.

SHAPRO & ROTHCHILD,
Attorneys for Trustee,

By /s/ DANIEL ARONSON, JR.

[Endorsed]: Filed December 12, 1955.

[Title of District Court and Cause.]

SECOND SUPPLEMENTAL STIPULATION OF FACTS

It Is Further Stipulated by and between the Trustee in Bankruptcy herein and claimant, Palo Alto Mutual Savings & Loan Association, through their respective counsel of record, that said claimant did not at the special instance and request of said Trustee or any other person advance additional funds after the filing of the Petition herein to complete the homes or for any other purpose.

Dated: December 16, 1955.

SHAPRO & ROTHCHILD,

By /s/ DANIEL ARONSON, JR.,
Attorneys for Trustee.

PALO ALTO MUTUAL
SAVINGS & LOAN ASS'N,

By /s/ LORENZ COSTELLO,
One of Its Attorneys.

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The Palo Alto Mutual Savings and Loan Association, a secured creditor of the bankrupt, has petitioned this Court to review the Referee's order

denying the claim of the petitioner for post-bankruptcy interest on its secured claim. The Referee found that the property which was the security was sold by the Trustee for a sum sufficient to pay the principal sum, together with interest thereon to the date of payment due under the respective deeds of trust on said property, plus the costs of sale, but for a sum insufficient to pay in full the junior secured creditors.

In this situation the Referee considered himself bound by *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (Cir. 9, 1951). Petitioner urges that *Beecher* incorrectly holds that *U. S. v. Sampsell*, 153 F. 2d 731 (9 Cir., 1946) was overruled by *Vanston Committee v. Green*, 329 U. S. 156, and that in any event this case comes within the equitable exceptions set forth in *Beecher*.

Both the Referee and this Court are bound by the decision of the Court of Appeals for the Ninth Circuit in *Beecher* that *Vanston* overruled *U. S. v. Sampsell* on the question of whether post-bankruptcy interest should be allowed on a secured claim when the sale proceeds of the security were ample for that purpose.

As to the equities, the petitioner fails to come within any of the exceptions to the ban against the payment of post-bankruptcy interest set forth in *Beecher*. Here the estate is not solvent; nor is it shown that the security has yielded any income which could be used to pay post-bankruptcy inter-

est on the secured claim. The petitioner here basically is in no different position than the Bank in Beecher, and although the opinion in Beecher does not clearly indicate whether the proceeds from the sale of the security were sufficient to pay interest on the secured creditor's claim, the grounds for the decision in that case are applicable here where there are sufficient funds to pay interest on the secured creditor's claim for the period of time following bankruptcy to the sale of the security. The fact that the interest money thus preserved for the bankrupt's estate would go to a junior secured creditor, rather than other creditors does not alter the equities. Petitioner has proved no equity which would take this case out of the Beecher rule. For a similar situation see *In the Matter of California Constructors, Inc., bankrupt*, No. 38991 on the records and files of the United States District Court for the Northern District of California, Southern Division, and the memorandum opinion of Honorable Edward P. Murphy filed June 10, 1953.

It Is, Therefore, Ordered, Adjudged and Decreed that the Referee's order be and the same is hereby affirmed, and his report be, and the same is hereby approved.

Dated: February 13, 1956.

/s/ OLIVER J. CARTER,

United States District Judge.

[Endorsed]: Filed February 13, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Palo Alto Mutual Savings and Loan Association, corporation, a secured creditor of the Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain Order approving the Referee's Order denying the claim of the Palo Alto Mutual Savings and Loan Association, corporation, a secured creditor of the Bankrupt, for post-bankruptcy interest on its secured claim, made and entered in the above-entitled proceedings by the Honorable Oliver J. Carter, one of the Judges of the above-entitled Court, February 15, 1956, which said Order approved the Order of the Referee in Bankruptcy, dated the 18th day of May, 1955, disallowing post-bankruptcy interest of the secured creditor of the Bankrupt in the estate of the above-named Bankrupt.

Dated: March 13, 1956.

LORENZ COSTELLO,
CLARENDON W. ANDERSON,
FABER L. JOHNSTON, JR.,

Attorneys for the Appellant, Palo Alto Mutual Savings and Loan Association, Formerly the Palo Alto Mutual Building and Loan Association, a Corporation,

By /s/ LORENZ COSTELLO.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Palo Alto Mutual Savings and Loan Association, Plaintiff and Appellant in the above-entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against it in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendant in said action, on the 13th day of February, 1956; and

Whereas, the said appellant is required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, Therefore, Fireman's Fund Indemnity Company, of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellant and acknowledges itself bound to the said Defendant in the sum of Two Hundred Fifty and no/100 Dollars (\$250.00) that the said appellant will pay all costs which may be adjudged against it on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and no/100 Dollars (\$250.00).

It Is Further Stipulated as a part of the foregoing understaking that in case of the breach of any condition thereof, the above-entitled District Court may, upon notice to the surety of not less

than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judgment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 13th day of March, 1956.

[Seal]

FIREMAN'S FUND
INDEMNITY COMPANY,

By /s/ W. STANLEY PEARCE,
Attorney-In-Fact.

State of California,
County of Santa Clara—ss.

On this 13th day of March, 1956, before me, Esther M. Hedges, a Notary Public in and for said Santa Clara County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared W. Stanley Pearce, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company, and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the

said County of Santa Clara, the day and year in this certificate first above written.

[Seal] /s/ ESTHER M. HEDGES,
Notary Public in and for the County of Santa
Clara, State of California.

My commission expires August 22, 1959.

[Endorsed]: Filed March 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys:

Claim of Lien to Real Property and Proof
of Secured Debts.

Trustee's Objections to Proof of Secured
Claims of Palo Alto Mutual Savings & Loan
Association.

Order Sustaining Trustee's Objections to
Proofs of Secured Claims of Palo Alto Mutual
Savings and Loan Association.

Petition for Review.

Referee's Certificate on Petition for Review
of Referee's Order Sustaining Trustee's Ob-
jections.

Stipulation of Facts.

Supplemental Stipulation of Facts.

Second Supplemental Stipulation of Facts.

Memorandum and Order.

Notice of Appeal.

Designation of Record on Appeal.

Undertaking for Costs.

Received 4/17/56.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court, this
17th day of April, 1956.

[Seal] C. W. CALBREATH,
 Clerk,

/s/ WM. J. FLINN,
 Deputy Clerk.

[Endorsed]: No. 15105. United States Court of Appeals for the Ninth Circuit. Palo Alto Mutual Savings and Loan Association, Appellant, vs. Ralph E. Williams, Trustee in Bankruptcy of John E. Duskin, Formerly Known as John E. Duskin, General Contractors, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California Southern Division.

Filed April 17, 1956.

Docketed April 20, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,105

In the Matter of:

JOHN E. DUSKIN, JR. (Formerly Doing Business as John E. Duskin, Jr., General Contractor),

Bankrupt.

APPELLANT'S CONCISE STATEMENT OF
POINTS TO BE URGED ON APPEAL

Comes now, Palo Alto Mutual Savings and Loan Association, Appellant herein, and in accordance with Rule 17(6) of the Federal Rules of procedure specifies the following as a Concise Statement of Points of which it intends to rely on the Appeal from the Order Affirming Referee's Order sustaining Trustee's objections to proofs of secured claims of Palo Alto Mutual Savings and Loan Association made and entered by the Honorable Oliver J. Carter, United States District Court Judge for the Northern District of California, on February 13, 1956, and more particularly described in the Notice of Appeal heretofore filed with the clerk of the said Court on March 15, 1956, as follows:

(1) The District Court in said Order of February 13, 1956, erred in affirming the Order of the Referee in Bankruptcy, dated May 17, 1955, sustaining Trustee's objections to the proofs of the secured claims of the Palo Alto Mutual Savings and Loan Association;

(2) The District Court in said Order of February 13, 1956, erred in disallowing post-bankruptcy

interest of the secured claims of the Appellant herein;

(3) The District Court in said Order of February 13, 1956, erred in ruling that Palo Alto Mutual Savings and Loan Association, the Appellant herein, failed to prove equities to come within any of the exceptions to the ban against payment of post-bankruptcy interests;

(4) The District Court in the Order of February 13, 1956, erred in applying the rule concerning post-bankruptcy interest as applied in the Beecher case (Beecher v. Leavenworth State Bank, 192 F. 2nd, 10 (9th Cir., 1951) to the secured claims of the Appellant, as the facts and nature of the secured claims in the Beecher case are different and clearly distinguishable to the claims of the Appellant from the case at bar.

Dated April 23, 1956.

PALO ALTO MUTUAL
SAVINGS & LOAN ASS'N,
Appellant,

By /s/ LORENZ COSTELLO,
One of Its Attorneys.

Dated: April 23, 1956.

Receipt of copy acknowledged.

[Endorsed]: Filed April 26, 1956.

No. 15,105
United States Court of Appeals
For the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

VS.

RALPH E. WILLIAMS, Trustee in Bank-
ruptcy of John E. Duskin, formerly
known as John E. Duskin, General
Contractors, Bankrupt,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

LORENZ COSTELLO,

624 University Avenue, Palo Alto, California,

FABER L. JOHNSTON, JR.,

First National Bank Building, San Jose, California,

CLARENDON W. ANDERSON,

Bank of America Building, Santa Rosa, California,

Attorneys for Appellant.

FILED

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No. 15,105

United States Court of Appeals For the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

vs.

RALPH E. WILLIAMS, Trustee in Bank-
ruptcy of John E. Duskin, formerly
known as John E. Duskin, General
Contractors, Bankrupt,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S OPENING BRIEF.

A. STATEMENT OF PLEADINGS, FACTS AND JURISDICTION.

This is an appeal from that certain order, made and entered on February 15, 1956 by Honorable Oliver J. Carter of the United States District Court, which order approved the Referee in Bankruptcy's prior order denying appellant's claim against the estate of the above-named bankrupt for post-bankruptcy interest on its secured claim.

The Appellate Jurisdiction of this Court is provided for by 11 U.S.C.A. 47, 48, and 28 U.S.C.A. 225(c).

On and prior to July 14, 1954, John E. Duskin, Jr. (bankrupt herein) and his wife as joint tenants owned two unimproved parcels of real property in the County of Santa Clara, State of California.

Appellant herein is a Savings and Lending institution created under the laws of the State of California and subject to the rules and regulations of the Building and Loan Commissioner of said State, as well as subject to the laws and statutes of the United States regulating such lending institutions. On August 17, 1953, said appellant made two construction loans to the bankrupt and his wife, each in the principal sum of \$10,999.00, each evidenced by the execution and delivery to appellant of a promissory note with interest at $5\frac{1}{2}$ per cent per annum and each secured by a properly recorded first deed of trust on each of said parcels of real property respectively (T.R. 46 to 52).

Each promissory note provided for $5\frac{1}{2}$ per cent interest per annum on the balance thereof until paid (T.R. 5). Each deed of trust provided that it was security for not only the principal of the note it secured but also the interest therein provided for until the whole amount of principal and interest had been repaid in full (T.R. 7, 8).

The whole principal sum of the first loan was used solely by the borrowers in improving the parcel

securing that particular loan by constructing a home thereon, and likewise the whole principal sum of the second loan was so used by borrowers in erecting a home on the second parcel securing that second loan (T.R. 46 to 52).

On July 14, 1954, John E. Duskin, Jr., was adjudged bankrupt. On said date no part of either of the above principal sums had been paid, and under the terms of the note and deed of trust as to each parcel accrued interest was due and unpaid.

Within proper time limits, appellant filed its verified claims of secured lien, claiming the principal sum due on each promissory note, together with interest thereon at $5\frac{1}{2}$ per cent per annum until the principal sum was repaid, and asking for other certain costs and fees (T.R. 3, 20, 21, 48 and 49).

On March 18, 1955, the trustee herein, pursuant to an order of the referee in bankruptcy, sold both parcels free and clear of liens, each for an amount sufficient to pay the principal sum due appellant, together with interest on said principal sum, as provided by the promissory note for which deed of trust was given as security, to the date of sale. At the time of filing the petition in bankruptcy there existed a second deed of trust on each of the parcels of real property herein mentioned, and also there existed of record against both parcels various claims of lien of laborers and materialmen. Said second deeds of trust and all of the above-mentioned claims of lien were subordinate to the first deeds of trust in favor of appellant (T.R. 50).

On the aforesaid sale free and clear of liens the sales proceeds, even though post-bankruptcy interest were withheld after date of adjudication, were not sufficient to pay in full the claims of the second deed of trust holders. Regardless then of whether post-bankruptcy interest was or was not allowed to appellant, there were no funds available from either of said sales for the benefit of general unsecured creditors (T.R. 53).

Subsequent to the above sale free and clear of liens, the trustee, on April 22, 1955, filed objections to appellant's claims of lien insofar as they claimed interest after July 14, 1954. The referee, on May 14, 1955, made his order allowing each claim as to principal, interest to July 14, 1954, and certain other costs, but disallowing interest from July 14, 1954 to March 18, 1955, the date of sale (T.R. 23-28). This denied appellant's claim for interest in the sum of \$418.20 as to the first loan and \$418.20 as to the second loan, and therefore for a sum in excess of \$500.00.

B. STATEMENT OF QUESTION PRESENTED.

(A) General Question.

Where property is sold in bankruptcy proceedings free and clear of liens, and the sales proceeds are sufficient to pay principal of the claim for which the property is a first security, together with accrued interest to date of sale, shall the post-bankruptcy interest be allowed?

(B) Specific Question.

The above question, together with any one or more or all of the following factors:

(1) the terms of the agreement creating the security specifically provide that the same shall secure payment of interest to date of repayment of principal;

(2) where the secured claimant is a savings and loan association, and made a construction loan on the security of a first deed of trust on real property, the proceeds of which loan are directly converted into an improvement built upon said property;

(3) even if post-bankruptcy interest is *not* allowed, sales proceeds are not sufficient to benefit any general unsecured creditors at all;

(4) the only party benefited by disallowing post-bankruptcy interest is the junior deed of trust claimant, who, had the property been sold *outside* of bankruptcy proceedings, would not have received this bonus.

C. SPECIFICATIONS OF ERROR.

1. The order disallowing interest to date of sale of the security where sales proceeds were sufficient to pay such interest is contrary to the law of the United States.

2. Said order is contrary to the law of the United States, in that it incorrectly interpreted and/or incorrectly applied the case of *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (9th Cir., 1951).

3. If said order correctly interpreted and correctly applied the aforesaid *Beecher* case, then, said case being contrary to the prevailing law as established by the Bankruptcy Act, the Supreme Court and the courts in all other circuits of these United States, should be overruled.

D. ARGUMENT.

Initially, it is clear that where a security is sold free and clear of liens in ordinary bankruptcy proceedings, where the security by its terms includes the payment of interest, and the sales proceeds are sufficient to pay the interest to date of sale as well as the principal of the claim, the Supreme Court on the few occasions it has dealt with the topic and United States courts in all circuits (including the Ninth until 1951) allow the post-bankruptcy interest to date of sale.

Sexton v. Dreyfus, 219 U.S. 339, 55 L. Ed. 244 (1911);

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 79 L. Ed. 1593 (1935);

Vanston Bondholders v. Green, 329 U.S. 156 91 L. Ed. 162 (1946);

Kagen v. Industrial Washing Machine Co., 182 F. 2d 139, 146 (1st Cir., 1950);

Re Gotham Can Co., 48 F. 2d 540 (2nd Cir., 1931);

Re Torchia, 185 F. 576, 188 F. 207 (3rd Cir., 1911);

Littleton v. Kincaid, 179 F. 2d 848, 852 (4th Cir.);

United States v. Paddock, 187 F. 2d 271 (5th Cir.);

Re Macomb Trailer Coach, Inc., 200 F. 2d 611 (6th Cir., 1953);

In re Chicago R. I. & P. Ry. Co., 155 F. 2d 889, 892 (7th Cir.);

U. S. Trust Co. v. Zelle, 191 F. 2d 822 (8th Cir., 1951);

United States v. Sampsell, 153 F. 2d 731 (9th Cir., 1946);

In re Deep Rock Oil Co., 113 F. 2d 266, 269 (10th Cir., 1940);

In re Fabacher, D.C.E.D., 193 F. 556 (D.C.).

This arises from the very nature of a sale free and clear of liens. The lien attaches to the proceeds, and the only question is *what* the lien secures. Traditionally, property rights valid by state law are not impaired by bankruptcy (*Oppenheimer v. Oldham*, 178 F. 2d 386 (C.A. 5th, 1949)). Section 57(h), Bankruptcy Act, mandates that securities shall be converted into money "according to the terms of the agreement pursuant to which such securities were delivered. * * *." If the agreement provides that interest to date of payment is *also* secured, that is that.

The case at bar is exactly that type of case. Yet the order herein complained of *denies* appellant post-bankruptcy interest to date of payment. In so doing

it relies solely upon the case of *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (9th Cir., 1951), and the *Beecher* case in turn cites the *Sexton* and *Vanston* Supreme Court cases, apparently for its position.

To clarify the immediately apparent confusion, an analysis of these two Supreme Court cases is first necessary.

Sexton v. Dreyfus started out as a secured claim case, ended by denying post-bankruptcy interest under the *unsecured claims* rule.

The reason is relatively simple. Creditors holding pledged securities sold them after bankruptcy, and didn't realize enough to pay even the *principal* secured, much less interest. Coyly they tried to pay themselves interest first, the remainder on principal, and prove the balance as general creditors. Since sales proceeds of the security were *not sufficient* to pay post-bankruptcy interest, there was nothing to take the case out of the unsecured claims rule—for as to the balance due it was just that: a secured claim with security exhausted, which is just about as unsecured as you can get.

Twenty-four years later this same Supreme Court (*Louisville Joint Stock Land Bank v. Radford*, *supra*) denounced the contention that interest on secured as well as unsecured claims ceases with the filing of the petition where the situation deals with a *sale free of liens*, stating (footnote 31):

“But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove

for the deficiency against the bankrupt estate, *Sexton v. Dreyfus*, 219 U.S. 339, 55 L. Ed. 244, 31 S. Ct. 256, 25 Am. Bankr. Rep. 363. *It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens.*" (Emphasis ours).

Thirty-five years after the *Sexton* case, the Supreme Court decided *Vanston Bondholders v. Green*, 329 U.S. 156, 91 L. Ed. 162 (1946). Here the sales proceeds *were* sufficient to pay principal and interest. In allowing interest to date of payment (but disallowing interest *on* that interest), again the Supreme Court interprets the meaning of the *Sexton* case, saying, on page 164:

"Simple interest on secured claims accruing after the petition was filed was denied *unless the security was worth more than the sum of principal and interest due*. *Sexton v. Dreyfus* (U.S.), *supra*." (Emphasis ours).

Thus the interpretation of the *Sexton* case as being limited to where sales proceeds are *not* sufficient to pay post-bankruptcy interest is not merely our own. The same Supreme Court on these two later occasions itself so interpreted it.

Numerous Circuit Court cases, notable among them for clear discussion being *Oppenheimer v. Oldham* and *In re Gotham Can Co.*, *supra*, also carefully explain the application of the *Sexton* case.

Oppenheimer v. Oldham, *supra*, was a first deed of trust case where the security was sold by the bankruptcy court free and clear of liens, and the

proceeds being sufficient to pay interest to date of payment of principal, interest was paid. After referring to the *Vanston* case as authority for *allowing* such interest, the case goes on to state the rule that:

“It has always been a fundamental principle of the bankruptcy law that the property rights and interests designed as liens and pledges, when valid in bankruptcy, shall not be impaired in the administration of a bankrupt estate.”

In re Macomb Trailer Coach, Inc., 200 F. 2d 611 (6th Cir.) (*id.*, *Weeks v. McInnis*), should be noted at this point in discussing the *Sexton* and *Vanston* cases, not only for its facts and reasons but also because the Supreme Court denied certiorari (345 U.S. 958 (1953)) some two years *after* the *Beecher* case.

A sale was ordered and made free and clear of liens. Sales proceeds *were* sufficient to pay interest to date of payment of principal on the secured claim, which was allowed. In so doing the court stated (p. 613):

“Appellee relies upon *Sexton v. Dreyfus*, *supra*, 219 U.S. 339, 31 S. Ct. 256, 55 L. Ed. 244; and *City of New York v. Saper*, *supra*, 336 U.S. 328, 69 S. Ct. 554, 93 L. Ed. 710. In our opinion, these cases * * * did not involve the same question which is presented here. * * * *Sexton v. Dreyfus* involved a question of marshalling. *City of New York v. Saper* involved interest on tax claims which are not secured obligations. See *In re Gotham Can Co.*, 2 Cir., 48 F. 2d 540, and *In re Worden*, D.C. W.D. Ky., 107 F. Supp. 496, where

two of these cases are so distinguished. On the contrary, the rule contended for by appellants was recognized as the correct rule by the Supreme Court in *Coder v. Arts*, 213 U.S. 223, at page 245, 29 S. Ct. 436, 53 L. Ed. 772. In the opinion in *Vanston Bondholders Protective Committee v. Green*, supra, 329 U.S. 156, at page 164, 67 S. Ct., at page 240, the Court in stating the general rule said—"Simple interest on secured claims accruing after the petition was filed was denied *unless the security was worth more than the sum of principal and interest due.*" (Emphasis added.) Our ruling in favor of the appellants is also in accord with similar rulings in a number of the circuits."

With this background, we now turn to *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (9th Cir., 1951). Prior to *Beecher*, there was no particular confusion as to just what the rule was in the Ninth Circuit on this question.

United States v. Sampsell, 153 F. 2d 731 (9th Cir., 1946), noted that where the security was worth enough to support a post-bankruptcy interest claim, the rule that interest stops on the date of bankruptcy did not apply. This was in line with all other circuits.

The *Beecher* case, in a footnote appended on page 14 (192 F. 2d 10, at 14), states that *United States v. Sampsell*, supra, was "necessarily overruled" by the Supreme Court in the *Vanston* case. This is an untrue statement. In the *Vanston* case the bankrupt estate was insolvent, but the security itself was sufficient to pay principal plus post-bankruptcy interest.

And, although interest on interest was denied, simple post-bankruptcy interest *was allowed*. (See, also, earlier discussion.) The *Vanston* case, then, not only didn't overrule *United States v. Sampsell*, but applied the identical rule and came up with the identical result as to simple post-bankruptcy interest.

Thus not only is the footnote wrong, but it is unnecessary to the *Beecher* case anyway, as will be seen. We mention it, however, since the order herein appealed from appears primarily to rely on it to deny post-bankruptcy interest, saying (T.R. 55):

“Both the Referee and this Court are bound by the decision of the Court of Appeals for the Ninth Circuit in *Beecher* that *Vanston* overruled *U. S. v. Sampsell* on the question of whether post-bankruptcy interest should be allowed on a secured claim when the sale proceeds of the security were ample for that purpose.”

In *Beecher v. Leavenworth State Bank*, *supra*, creditors of *Beecher* held mortgages on his property. In April, 1939 they purchased the property at sheriff's sale after obtaining judgments of foreclosure in a Washington state court. This constituted their “security” when, on February 1, 1940, *Beecher* filed in bankruptcy. There was no sale of the security in the bankruptcy free and clear of liens, but an order allowing claims pursuant to Section 75 of the Act, which order disallowed interest on the debts after date of filing.

There was no discussion as to whether or not sales proceeds were or were not sufficient, there being no sale. The court moreover noted (p. 14):

“* * * there has been a failure to appraise the redemption value of the farm-debtor property.”

Following is the text of the *Beecher* case in support of its decision (p. 14):

“As a general rule, interest stops on both secured and unsecured claims upon the date of filing the petition in bankruptcy. This is a rule of convenience which has developed from a century and a half of English bankruptcy practice. The basis of the rule is to allow orderly administration of the bankrupt's estate; matters must be brought to a halt at the time certain and this date allows the rendition of accounts without doubt as to any future claims for interest. Certain peculiar considerations require the application of the rule to interest on secured claims. Otherwise, *the equity of unsecured creditors is in danger of being wiped out by interest claims of secured creditors who have extended credit at high rates during the debtor's transitional period of financial embarrassment prior to bankruptcy.* Further, the period of administration may be lengthy, especially when, as here, there has been a failure to appraise the redemption value of the farm-debtor's property.” (Emphasis added).

“A contrary rule for secured claims would also discourage contests by the unsecured creditors of secured claims. They would be forced to abstain so that the administration of the estate could be wound up quickly; and the trustee would have every motive to make quick sales in order to bring administration to a halt shortly.

Two qualifications of the rule that interest on secured claims stops at the date of bankruptcy have been recognized:

(1) If the estate turns out to be fully solvent, it has been thought more equitable to apply the surplus to creditors' claims for interest rather than returning the money to the debtor.

(2) If securities in the creditors' possession pledged as collateral yield income, this amount has been charged with the secured creditors' claims for interest.

Except as stated above, the only time in which the majority of modern cases have allowed interest after bankruptcy on secured claims is when the courts have discovered equitable reasons for doing so. *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 91 L. Ed. 162; *Pacific States Corp. v. Hall*, 9th Cir., 166 F. 2d 688."

Two things are apparent from the above language: First, a general rule is announced, two exceptions spelled out, and a third exception noted in passing that certain other cases have "equitable reasons" for allowing interest, citing *Vanston* as such a case. Risking repetition, we again point out that in the *Vanston* case there was a specific finding that sales proceeds *were* sufficient to pay post-bankruptcy interest, and such interest was allowed.

In *Pacific States Corp. v. Hall* (166 F. 2d 688 (9th Cir., 1948)) there was *no* specific finding of any sales proceeds being sufficient—the court stating just to the contrary, that (p. 672)

"from the record before us, *the value of the security* and the relative equities between the secured creditor and the subordinate creditors *cannot be determined*" (emphasis ours)

and for that reason denied secured claimant's claim for post-bankruptcy interest. The same point appears in the *Beecher* case. As before seen, there was not only no sale free and clear, but the court specifically found a complete failure to even appraise the redemption value of the security (*supra*).

The only "equity" then clearly present in the *Vanston* case, and absent in the *Beecher* and *Pacific States* cases, was and is the finding of security value sufficient to pay post-bankruptcy interest.

The second thing apparent from the quoted language is the reason—the policy basis—announced as supporting the *Beecher* rule.

That is, the danger of lessening the unsecured creditor's equity in proceeds over and above all secured claims, discouraging the contesting of secured claims by unsecured creditors because of interest piling up and sapping their equity during litigation, and a resultant motivation of the trustee to make quicker sales.

In the case at bar the record before this Court shows the proceeds are sufficient to pay appellant's interest to date of sale, but are not sufficient to create any equity whatsoever for general unsecured creditors regardless of whether post-bankruptcy interest is or is not allowed. The only single result of denying appellant post-bankruptcy interest is to give the second deed of trust holders a bonus they would not otherwise receive if the property were subjected to foreclosure under ordinary California state law proceedings.

To our knowledge, *Wilson v. Dewey*, 133 F. 2d 962 (8th Cir., 1943), is the most recent case in any Circuit Court to handle this precise question. The bankrupt's real property was subject to a first trust deed of \$12,000 at 6 per cent and a second trust deed of \$3,000 at 6 per cent. On a sale free and clear, the sales proceeds were sufficient to pay the first encumbrance plus post-bankruptcy interest, but not enough to pay even all the principal of the second deed of trust. As between denying post-bankruptcy interest to the first and applying it towards the second, the Circuit Court held the first encumbrance entitled to principal and all post-bankruptcy interest to date of payment in preference to payment of that interest towards the principal of the second deed of trust.

We hardly believe the quoted reasons for the *Beecher* decision are intended to establish a rule for the Ninth Circuit contrary to all other circuits and to the Supreme Court, for the facts of that case differ notably by their absence. But even if those reasons were sufficiently controlling, their presence in *Beecher* is highlighted by their absence in the present case now on appeal.

It is fundamental under California state law that the lien of a deed of trust, if it so declares, secures the payment of interest until such time as all principal is repaid (*In re Haacke* (D.C. Cal.), 25 Cal. 311), and the express provision in a note that interest accrues and is payable until the principal is paid is to be enforced (*Bell v. San Francisco Savings Union*, 153 Cal. 64, 94 P. 225).

In sales free and clear of liens, most Circuit Court cases allowing post-bankruptcy interest mention that the security by its terms includes the securing of interest until principal is repaid. None of them, though, seems to specifically cite Section 57(h) of the Bankruptcy Act dealing with ordinary bankruptcies. In part, it reads as follows:

“The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, * * *” (Emphasis ours).

In the *Beecher* case, the security of the creditor in question was not based on an agreement any longer existing, but was solely the decree of foreclosure granted under Washington state law. Consequently, the above quoted section would not necessarily be applicable at all in the Section 75 proceeding of *Beecher v. Leavenworth State Bank*. On the contrary, in reference to interest on secured claims under a Section 75 proceeding (as was *Beecher's*), Section 75(K) specifically allows the bankruptcy court almost free hand in dealing with interest on secured claims, stating:

“* * * but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured.”

The distinction between the interest rule on unsecured claims, on secured claims, and on secured claims where the security is sufficient to cover interest, is

ably brought out in Volume XI, No. 3 of *Business Lawyer* (April, 1956), in an article by Milton P. Kuffer (pp. 74, 75):

“The first important principle relates to the collectibility of interest. It is frequently stated that ‘in bankruptcy, interest on claims ceases on the date of petition filed’. Properly understood within its limitations, this principle is perfectly valid. The limitation is that it applies only to unsecured claims. It is simple arithmetic that, when interest on all unsecured claims is cut off at the date of bankruptcy, the ultimate distributional result is exactly the same as if interest were accrued upon them to the date of the final liquidation of the estate. And such is the law, even with respect to claims of the sovereign, such as for taxes. Not so, however, with respect to secured claims to the extent to which the value of the security may be sufficient to meet interest and contractual and other legitimate charges. A moment’s reflection establishes the distinction. When a lender takes security, at that moment his lien for advances and interest attaches to it, and the supervention of bankruptcy does not—as it cannot—diminish his rights. It therefore follows that, so far as the value of his security may be sufficient for the purpose, he may retain and look to his security for the full payment of the principal of his claim, and interest and contractual and other legitimate charges upon it, right down to the date of payment.

Obviously, this rule does not extend beyond its reason. It does not apply to the extent to which the realization upon the security is insufficient. As to such insufficiency, as just noted, a lender

is an unsecured creditor and must share with them in the distribution of the general assets

* * *

as well as in the annotation in 27 A.L.R. 2d 586, at 592:

“Even in the absence of a general surplus in the bankrupt’s estate, the question is frequently presented as to whether interest accruing after bankruptcy should be allowed on a secured claim where the property pledged has come into the trustee’s hands *and been sold*, realizing more than enough to satisfy the principal of the secured debt. Since (1) ordinarily the security in question has been given to secure the payment of interest as well as principal, (2) by adopting other available procedures for the collection of his claim the creditor could have realized on the security for such interest as well as principal, and (3) Section 67 of the 1898 statute (11 USC Section 107) expressly provided that bona fide liens should not be affected by bankruptcy, it has generally been held that where the sale of the security by the trustee realizes more than enough to satisfy the principal of the secured claim, any surplus should be applied to the satisfaction of after-accruing interest before being turned into the general funds of the estate. *Vanston Bondholders Protective Committee v. Green* (1946), 329 U.S. 156, 91 L. Ed. 162.” (To the same effect a great many cases from the Districts Courts and the various Circuit Courts are cited.)

We have not at length discussed cases cited from the other nine circuits which uniformly hold that post-bankruptcy interest *is* allowed under the circum-

stances of this kind, primarily because we do not anticipate any serious contention that they do not so hold. Rather, we have tried to show the Supreme Court's real position to date, and that the *Beecher* case is either a peculiar animal which should be penned up in its own backyard or else, if it is so vicious as to be capable of further unpredictable interpretation, it should then be put quietly to rest.

It has been appellant's contention through the lower courts that the case at bar could as easily be decided by *following* the *Beecher* rule under the third exception entitled generally "equitable reasons" (page 13) for allowing post-bankruptcy interest, those equities being:

(1) Sale free and clear of liens (*Louisville Joint Stock Land Bank v. Radford, supra*);

(2) Sales proceeds sufficient to cover post-bankruptcy interest (*Vanston v. Bondholders Protective League, supra*);

(3) Agreement providing that security covers interest to date of payment of principal (Bankruptcy Act, Section 57(h));

(4) Proceeds of loan for which security given goes directly to improvement of the security, increasing its value proportionally;

(5) Disallowed post-bankruptcy interest not creating any funds or equity for general creditors, but only granting a bonus to junior secured claimant otherwise not available under state law foreclosure;

(6) Status of junior secured claimants, on notice at time of loan (from recordation) that interest to date of payment of principal will be paid first encumbrances prior to any payment on junior security;

(7) Status of secured claimant as savings and loan association, promoting federal policy of ease in home building (e.g., FHA and VA insured loans);

(8) Status of secured loan, as one for construction of home.

None of these equities appear definitely to have existed in *Beecher v. Leavenworth State Bank* after a careful review of the facts.

We still feel this is so. However, at this time we are now before a court which is not at all "bound" by the *Beecher* case, and need not follow it.

If *Beecher* is to be interpreted as disallowing post-bankruptcy interest even where the security covering interest is sold free and clear and the sales proceeds are sufficient to pay it, unless even *more* "equitable reasons" exist, then it allows the taking away of a valuable property right which none of the other circuits of these United States countenances, such taking being allowed under a very vague formula. "Equitable reasons" may mean one thing to one referee, another to another, and conceivably, in times when more bankruptcies are expected to be filed this fiscal year than even at the height of the depression

in 1932,¹ reviews could begin to clutter up the federal courts in this circuit with examinations of each particular case.

Our Constitution requires the enactment of uniform laws in the field of bankruptcy. There is no less reason for uniformity in judicial decisions. If *Beecher v. Leavenworth State Bank* is consistent with allowing post-bankruptcy interest to date of sale of the security free and clear of liens when the security itself provides that it secures such interest and proceeds are sufficient (whether we call this the "equitable reason" or not being unimportant), then it is not in conflict with the law as presently prevailing in all other circuits and was merely misinterpreted in the instant case by the District Court.

But if the *Beecher* case is not consistent with the above rule, then for all the reasons hereinabove set forth it should be disapproved, overruled, or both.

Wherefore, appellant Palo Alto Mutual Savings and Loan Association prays for an order reversing that certain order of February 13, 1956, of Honorable Oliver J. Carter, United States District Court, which order affirmed and approved that certain order of Bernard J. Abrott of May 18, 1955, sustaining the trustee's objections to appellant's proofs of secured claims insofar as said proofs claimed interest at 5½ per cent per annum on principal unpaid from July 14, 1954, to and including March 18, 1955, and order

¹House Appropriations Committee Report, April 13, 1955; 70,049 bankruptcies filed in 1932, 75,000 expected for 1956.

that said trustee's objections be overruled and that trustee pay to appellant interest from July 14, 1954 to March 18, 1955, together with all costs of appeal incurred herein, and for such other and further relief as the Court deems just.

Dated, San Jose, California,
September 1, 1956.

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No. 15,105

United States Court of Appeals
For the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

vs.

RALPH E. WILLIAMS, Trustee of the Estate
of John E. Duskin, Jr., formerly doing
business as John E. Duskin, Jr., Gen-
eral Contractor, Bankrupt,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEE.

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United States Court of Appeals For the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

vs.

RALPH E. WILLIAMS, Trustee of the Estate
of John E. Duskin, Jr., formerly doing
business as John E. Duskin, Jr., Gen-
eral Contractor, Bankrupt,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Among the assets of the bankrupt estate were two parcels of real property, each of which was subject to the first deed of trust held by the appellant, one or more subordinate deeds of trust and various mechanic lien and judgment lien claimants. Pursuant to proceedings duly had before the referee in bankruptcy, the trustee on the request of the junior lien claimants

was authorized to sell all of the real property, including the two parcels subject to appellant's deed of trust, which parcels were sold for sums sufficient to pay the principal and interest to the date of the payment on appellant's deeds of trust, but for a sum insufficient to pay the second deeds of trust in full or anything on the mechanic lien claims.

QUESTION.

Where real property is sold in bankruptcy proceedings free and clear of liens, and the sale proceeds are sufficient to pay the principal of the first deed of trust, for which the property is first security, together with accrued interest thereon to date of payment, but are insufficient to pay the second deed of trust or the mechanic lien claims, can post-bankruptcy interest be allowed on the first deed of trust?

ARGUMENT.

The Court below in rendering its decisions disallowing post-bankruptcy interest, properly followed the rules set forth in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (9th Cir., 1951). The rules established by the *Beecher* case are clear and concise (as set forth on page 14 of the reported decision) and are cited by appellant in its brief at page 13.

We first answer the contention of appellant (Appellant's brief, page 12) that the rule of the *Beecher*

case does not apply to this situation in that the *Beecher* case arose under Section 75 of the Bankruptcy Act (Farm-debtor proceedings), by pointing out that the Supreme Court has consistently held that the interpretation of the Bankruptcy Act applies equally to straight bankruptcies, *City of New York v. Saper*, 336 U.S. 328, 93 L.Ed. 710; *Sexton v. Dreyfus*, 219 U.S. 339, 55 L.Ed. 244; Chapter X proceedings, *United States v. Edens*, 342 U.S. 912, 96 L.Ed. 682 (affirming 189 F. 876); and Chapter XI proceedings, *United States v. General Engineering & Mfg. Co., Inc.*, 342 U.S. 912, 96 L.Ed. 682 (affirming 188 F. 2d 80).

**A. SUPREME COURT CASES ON, AND HISTORY OF,
THE QUESTION.**

The first decision of the U. S. Supreme Court to consider is *Coder v. Arts*, 213 U.S. 223, 53 L.Ed. 772. The decision is lengthy. It deals with the law of fraudulent conveyances. The only statement on the question here presented to be found in either the opinion of the Court or in the arguments of counsel, as summarized in the Lawyers Edition report, is the second to the last sentence in the Court's opinion:

“Nor do we think the circuit court of appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt.”

There is no discussion whatsoever of the reason for this statement nor does it appear that the question

was squarely presented to the Supreme Court. The situation is very similar to that appearing in several Supreme Court cases referred to in *City of New York v. Saper*, 336 U.S. 328, 93 L.Ed. 710 *infra*, in which reference was made to interest on tax claims to date of payment, although the question of the allowability thereof was not presented to the Supreme Court in those cases.

According to the Supreme Court itself *Coder v. Arts* is authority for the following proposition:

“But where an estate was ample to pay *all* creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor *rather than to the debtor.*” (Emphasis added.)¹

Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 164, 91 L.Ed. 162, 167.

It will be noted therefore that *Coder v. Arts* according to the Supreme Court in the *Vanston* case, is authority for one of the two recognized exceptions referred to in the footnote from the *Saper* case hereinafter quoted. It will be pointed out below that these same exceptions were recognized by the Honorable Court in the *Beecher* case.

The next case to consider is *Sexton v. Dreyfus*, 219 U.S. 339, 55 L.Ed. 244. This case factually involved a slightly different situation in that the property which was security did not sell for a sum sufficient

¹When there are sufficient funds to pay all creditors in full, unsecured creditors are also paid interest to the date of payment.

to pay the principal in full, and the decision is therefore authority to the effect that a claim for post-bankruptcy interest will not share with the claims of unsecured creditors in the distribution of the assets of the estate. The reasoning of the Court and the language thereof is not limited to this situation as will be seen from the review of the history of the Bankruptcy Act by Justice Holmes at page 344, as follows:

“For more than a century and a half the theory of the English bankrupt system has been that everything stops at a certain date. Interest was not computed beyond the date of the commission . . . the rule was laid down not because of the words of the statute, but as a fundamental principle. We take our bankruptcy system from England, and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of a law goes with the words where they are copied by another state.” (Cases omitted.)²

The true significance of the *Sexton* decision becomes apparent when an examination is made of the decisions of the Circuit Court and of the district judge.

²That the Supreme Court has followed the rule that everything stops at a certain date is well pointed out in *White v. Stump*, 266 U. S. 310, 69 L. Ed. 301, which case involved homestead laws and wherein the court disallowed a homestead filed after bankruptcy holding that the law discloses a purpose “to fix the line of cleavage” with special regard to the conditions existing when the petition is filed, overruling this Court in 284 F. 199 which held that the homestead could be declared after bankruptcy. See also *Sampsell v. Straub*, 194 F. 2d 228.

Judge Hand, then a district judge, wrote the decision of the District Court under the name of *In re Kessler & Co.*, 171 F. 751. He reviewed many of the *English* cases, decided not to follow them, cited *Coder v. Arts* (supra), and held that the creditor could apply the proceeds of the sale first to the interest which accrued after bankruptcy.

The Circuit Court, in *In re Kessler*, 180 F. 979, by a divided opinion affirmed Judge Hand. The short dissenting opinion refers to the advantages of conforming to the practice in England.

The Supreme Court, in the *Sexton* case, therefore fully considered the diverging points of view and in reversing the Circuit Court adopted the rule that interest on all secured claims ceases at the date of bankruptcy.

In *Ex parte Lubbock*, 9 Jur. N.S. 854 (1863), cited by Justice Holmes, the Lord Chancellor, in exactly the situation presented in the instant case, held that the holder of the mortgage was entitled to interest only to the date of the filing of the petition, even though there was a surplus sufficient to pay the interest to the date of payment. In reaching his decision the Lord Chancellor stated:

“Nothing can be better settled by the practice of the court for the last sixty years, than that where securities consist of an equitable mortgage, and the mortgagee after bankruptcy presents a petition to have that security realized, he is not entitled to any interest subsequent to the date of the fiat.”

For additional history of the interpretation of the English Bankruptcy Act, we refer the Court to 2 *Blackstone's Commentaries* 488, wherein it was pointed out that the usual rule is that all interest ceases at the time of the issuing of the commission, and to the following cases cited by Mr. Justice Holmes, *Ex parte Bennet*, 2 Atk. 527; *Ex parte Wardell*, 1787; *Ex parte Hercy*, 1702; 1 *Cooke, Bankrupt Laws*, 4th Ed. 181; *Ex parte Badger*, 4 Ves. Jr. 165; *Ex parte Ramsbottom*, 2 Mont. & A 79; *Ex parte Penfold*, 4 De G. & S. 282; *Re Savin*, L.R. 7 Ch. 760, 764; *Ex parte Bath*, L.R. 22 Ch. Div. 450, 454; *Quartermaine's Case* (1892), L. Ch. 639; and *Re Bonacino*, 1 Manson, 59.

In 2 *Halsbury Laws of England*, at page 302, it is stated:

“If a secured creditor realises his security, he may prove for the balance of principal and interest, if any, due at the date of the receiving order after deducting the net amount realised. The net proceeds of such realisation must not be applied to interest accrued after such date, but profits made from an unrealised security after such date may be so applied.”^r

^r*Ibid.*, Sched. II, r. 10. See *Re Barker, Ex parte Penfold* (1851), 4 De G. & Sm. 282; 4 Digest 379, 3492; *Re Savin* (1872) 7 Ch. App. 760; 4 Digest 379, 3498; *Re London, Windsor and Greenwich Hotels Co., Quartermaine's Case* (1892), 1 Ch. 639; 10 Digest 950, 6506; *Re Bonacino, Ex parte Discount Banking Co.* (1894), L. Mans. 59; 4 Digest 379, 3497.

The next Supreme Court case to be considered is *City of New York v. Saper*, 336 U.S. 328, 93 L.Ed.

710, which involved the question as to whether interest runs on tax claims to date of payment rather than the date of bankruptcy.

Prior to this decision from the time of the enactment of the Bankruptcy Act, district and circuit Courts throughout the country had held that interest ran to the date of payment. The great number of cases cited to the Court to this effect did not sway it:

“Petitioners contend that judicial decisions during those periods have now been incorporated into a legislative policy allowing interest on tax claims to payment, thereby producing a rule of law beyond further judicial scrutiny.” (336 U.S. 333.)

Rather was the Court swayed by the argument of counsel for respondent, who contends that interest ceased at the date of bankruptcy:

“Precedent and reason indicate that this court should abrogate this rule of judicial origin in order to prevent the perpetuation of further inequities, inconsistencies and anomalies resulting from its application.” (336 U.S. 329.)

In reversing all previous precedent to the effect that interest on tax claims continues to the date of payment, Mr. Justice Jackson, speaking for the Court, referred, at page 330, to the rule dealing with interest on secured claims:

“More than forty years ago Mr. Justice Holmes wrote for this Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statu-

tory construction but rather, a fundamental principle of the English bankruptcy⁷ system which we copied. *Sexton v. Dreyfus*, 217 U. S. 339, 344; 55 L. Ed. 244, 245; 31 S. Ct. 256; 25 Am. Bankr. 363. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary.’”

⁷“In England the practice was well established, 2 Blackstone Commentaries 488. . . ; and *applied to mortgages as well as unsecured debts* . . . *Two exceptions are recognized*: if the alleged ‘bankrupt’ proved solvent, creditors received post-bankruptcy interest before any surplus reverted to the debtor . . . ; and if securities held by a creditor as collateral produced interest or dividends during bankruptcy, such amounts were applied to post-bankruptcy interest . . . These exceptions have been carried over into our system. See *American Iron & Steel Mfg. Co. v. Seaboard Air Line R. Co.*, 233 U. S. 261, 267; 58 L. Ed. 949, 954; 34 S. Ct. 502; *Sexton v. Dreyfus*, 219 U. S. 339, 346; 55 L. Ed. 244, 246; 31 S. Ct. 256; 25 Am. Bankr. 363.”

The *Saper* case, decided in 1948, is of course significant in that it shows a modern tendency to limit interest to the date of bankruptcy in spite of the apparently well settled rule to the contrary in the case of taxes.

It is interesting to note that just as before the *Saper* case the Supreme Court had not ruled upon the question of post-bankruptcy interest on tax claims, neither has the Supreme Court ruled on the allowability of post-bankruptcy interest on secured claims in a situation such as exists in the instant case.

The next Supreme Court case dealing with the question is *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 91 L. Ed. 162, previously

referred to. This case involved an indenture agreement which provided for the payment of interest on unpaid interest. While the debtor was insolvent its assets were sufficient to pay the first mortgage bondholders in full, including the interest on interest. The Court pointed out that should interest on interest be paid, subordinate creditors would receive a greatly reduced share in the reorganized corporation. The Court refused to allow interest on interest, as not being "in accord with the equitable principles governing bankruptcy proceedings."

As to the allowance of interest the Court stated, at page 165:

"It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor."

This case will be further discussed below.

B. DECISIONS OF THIS CIRCUIT.

In 1946, in *U. S. v. Sampsell*, 153 F. 2d 731, 736, this Court stated:

"The general rule holds that interest stops running upon secured and unsecured claims after a debtor passes into bankruptcy unless the estate is solvent . . . *Sexton v. Dreyfus* . . . There is an exception, however, holding that the rule does not apply to debts or claims of secured debts after and during bankruptcy when the mortgaged prop-

erty is sufficient to pay the principal and interest of the mortgaged debt. . . . The accrual of interest is a part of the debt to the mortgagee and should not be affected by bankruptcy. . . . To prevent the running of interest upon a secured debt, when the security is sufficient to pay the debt and the interest, would in effect permit the bankruptcy proceedings to adversely affect the lien which is contrary to the provision in the Bankruptcy Act that a lien shall not be affected by the Act. . . .”

This excerpt from that decision clearly shows that the Court had before it all of the arguments in favor of the rule contended for by counsel for appellant and adopted that rule. *The Sampsell case*, however, was expressly over-ruled in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10, in which case, in footnote 4, Chief Judge Denman stated:

“Our decision in *United States v. Sampsell*, 9 Cir., 153 F. 2d 731, allowing post-bankruptcy interest on a secured claim when the sale proceeds of the security were ample for that purpose was necessarily overruled by the Supreme Court in the *Vanston* case which followed the *Sampsell* case.”

The *Beecher* case arose in Washington and involved the allowability of various claims presented against the estate. Included in the claims presented for allowance was the secured claim of Katherine C. Parker and the secured claim of Chelan County. There is nothing in the decision to indicate whether the security was worth more or less than the amount of these claims. We likewise cannot ascertain from the opinion

whether the claims of Federal Land Bank of Spokane and of Leavenworth State Bank were secured at the time of the filing of the petition.

The opinion sets forth the general rule, the basis for the general rule, and the exceptions to the general rule.

The Court states that "as a general rule interest stops on both secured and unsecured claims upon the date of the filing of petition in bankruptcy." (Citing *Sexton v. Dreyfus, supra.*)

The Court advances the following reasons for the rule:

(a) It is a rule of convenience which has developed from a century and a half of English bankruptcy practice.

(b) The basis of the rule is to allow orderly administration of the bankrupt's assets.

(c) Matters must be brought to a halt at a time certain and the date of the filing of the petition allows the rendition of accounts without doubt as to any future claims for interest.

(d) Certain peculiar considerations require the application of the rule to interest on secured claims.

(i) Otherwise the equity of unsecured creditors is in danger of being wiped out by interest claims of secured creditors who have extended credit at high rates during the debtor's transition period of financial embarrassment prior to bankruptcy.

(ii) The period of administration may be lengthy.

(iii) A contrary rule would discourage contests of secured claims by the unsecured creditors who would be forced to abstain so that the administration of the estate could be wound up quickly and the trustee would have to make quick and possibly unadvantageous sales, so as to prevent the running of interest.

It will be noted that each of these arguments advanced by Chief Judge Denman applies equally to the situation where the property sells for a sum in excess of the principal and interest due on the secured obligation, and to the situation where the property sells for a sum less than sufficient to pay the secured claim.

The Court sets up recognized qualifications of the rule that interest on secured claims stops at the date of bankruptcy:

(a) Where the estate turns out to be fully solvent it has been thought to be more equitable to apply the surplus to creditors' claim for interest, rather than returning the money to the debtor.

(b) If the securities in the creditors' possession pledged as collateral yield income, this amount has been charged with the secured creditors' claim for interest, also on the basis of doing equity.

The Court points out that under *Vanston v. Green* (supra) interest shall be allowed after bankruptcy on secured claims only when equitable reasons exist for doing so. The *Vanston* case has previously been cited with approval in this circuit in *Pacific States Corporation v. Hall*, 166 F. 2d 668.

District judges in addition to District Judge Carter in the order herein complained of likewise have interpreted the *Beecher* case to deny post-bankruptcy interest except when within the enumerated exceptions. We call the Court's attention to the order of District Judge Murphy in the matter of *California Constructors, Inc., Bankrupt*. No. 38991, United States District Court for the Northern District of California, which order is set forth in Appendix A. We also call the Court's attention to the decision of District Judge Hall of the Southern District of California in the matter of *In re Pollard Bros., Ltd., a corporation, Debtor*, 128 F. Supp. 818, a case involving the allowance of interest after the filing of the petition in bankruptcy on a lien claim for taxes wherein Judge Hall reversed his previous decisions on the strength of the *Beecher* case and disallowed post-bankruptcy interest.

C. THE ORDER COMPLAINED OF.

With the decision of this Court in the *Beecher* case in mind it becomes pertinent to examine the order of the District Court herein complained of (T.R. p. 54):

“As to the equities, the petitioner fails to come within any of the exceptions to the ban against the payment of post-bankruptcy interest set forth in *Beecher*. Here the estate is not solvent; nor is it shown that the security has yielded any income which could be used to pay post-bankruptcy interest on the secured claim. The petitioner here basically is in no different position than the Bank

in *Beecher*, and although the opinion in *Beecher* does not clearly indicate whether the proceeds from the sale of the security were sufficient to pay interest on the secured creditor's claim, the grounds for the decision in that case are applicable here where there are sufficient funds to pay interest on the secured creditor's claim for the period of time following bankruptcy to the sale of the security. The fact that the interest money thus preserved for the bankrupt's estate would go to a junior secured creditor, rather than other creditors does not alter the equities. Petitioner has proved no equity which would take this case out of the *Beecher* rule."

The District Court's findings bring the facts of this case clearly within the rule expressed by this Court in the *Beecher* case.

D. DISCUSSION OF CASES CITED BY APPELLANT.

Appellant in its brief (pp. 6 and 7) cites a group of cases in support of its position that interest accruing after bankruptcy to the date of payment of principal is allowed where the sale of the property realizes enough to satisfy principal plus interest of the secured claim in question. The case cited by appellant in support of this decision decided by the Court of Appeals for the Ninth Circuit is *United States v. Sampsell* (supra), which case was specifically overruled in the *Beecher* case as hereinabove stated.

The case of *Oppenheimer v. Oldham* (5th Cir.), 178 F. 2d 386, cites *United States v. Sampsell*, as one of

the cases in support of its findings, as did *Kagen v. Industrial Washing Machine Co.*, (1st Cir.), 182 F. 2d 139. In the *Oppenheimer* case, the Court states that the practice of allowing interest on amply secured claims after the date of bankruptcy is consistent in principle with the Supreme Court cases of *Sexton v. Dreyfus*, and *Coder v. Arts*. The Court ignores, however, the "fundamental principle" enunciated in *Sexton v. Dreyfus*, and reaffirmed in *City of New York v. Saper*, which was carried over from the English system into our system, that interest on both secured and unsecured claims stops at the date of bankruptcy as a general rule. It seems more proper to say that the Bankruptcy Act manifests no intent to deviate from this latter principle. In any event, the decision of a Court in any circuit other than the Ninth Circuit is not binding in this circuit.

In re Gotham Can Co., 48 F. 2d 540 supports appellee's position where the Court held that interest and other charges accruing subsequent to the filing of the petition *must be expunged*.

In re Torchia, 188 F. 207, 26 Am.B.R., 579 is solely authority for the point that where rents are collected after bankruptcy, the lien claimant is entitled to his interest.

Littleton v. Kincaid, 179 F. 2d 848 was a case in which property in question was sold for an amount sufficient to pay *all* claims against the bankrupt, the expenses of the proceeding and a surplus was left from which the Court directed that post-bankruptcy interest be paid. The Court stated, at page 852:

“Ordinarily interest on claims against a bankrupt estate runs to the filing of the petition in bankruptcy, which in this case was filed on December 19, 1941. Section 63, Sub. a (1, 5), 11 U.S.C.A. Section 103, sub. a (1, 5), of the Bankruptcy Act; *City of New York v. Saper*, 336 U. S. 328, 69 S. Ct. 554; *Collier on Bankruptcy*, 14th Ed., Vol. 3, p. 1835 et seq. As was pointed out by Mr. Justice Holmes in *Sexton v. Dreyfus*, 219 U. S. 339, 344, 31 S. Ct. 256, 55 L. Ed. 244, this rule is not a matter of legislative command or statutory construction but, rather a fundamental principle of the English bankruptcy system which we adopted.”

And at page 853:

“... But the reason for the stoppage of interest on funds in custodia legis is not because the claims lose their interest bearing quality, but because of the inequality which would otherwise result in the forced distribution in receivership to debts carrying different rates of interest. This inequality, however, disappears when there is a surplus and then interest is allowed even while the funds are in custodia legis. . . .”

In *United States Trust Co. of New York v. Zelle*, 191 F. 2d 822, there were first mortgage bonds bearing 4% interest prior to maturity with no provision for the payment of interest after maturity. During the pendency of the proceedings the bonds matured and the appeal was taken from an order allowing only 4% interest on the bonds. The Court held at page 824

that *Vanston v. Green*, supra, not only condemned the allowance of interest on interest, but that:

"It definitely establishes the rule of law that any state statute which is not consistent with principles of equity in the management and distribution of a bankrupt estate under the Bankruptcy Act may be disregarded by the Bankruptcy Court."

The Court went on to state:

"... that the right to allowance of interest during bankruptcy does not necessarily spring from an authorization therefor by state law, but arises from equitable considerations resulting from the preferential position of secured creditors to general creditors."

And quoting from the *Vanston* case, that:

"... Bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles."

In *In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611 (6th Cir.) (cited by appellant at pp. 7 and 10) the Court cited the cases above referred to. The 6th Circuit Court of Appeals merely followed a rule which is *not* followed in this circuit, and clearly recognized that the rule in our 9th Circuit was different.

E. EQUITABLE PRINCIPLES

In its brief (p. 21) appellant discusses equitable reasons and contends that it is inequitable to deprive

a creditor of post-bankruptcy interest on a sale free of liens. Appellant overlooks the fact that, if the sale had been made subject to the liens, appellant would have had to stand the costs of the collection of the balance due under the deed of trust from the purchaser by reason of the time payments and the possibility that the purchaser would not have made the payments with the costs therein involved, or if the trustee had not sold the property and appellant had proceeded with foreclosure, appellant would have had the additional costs of the foreclosure. In either case, appellant might have suffered losses and rather than being paid its principal, together with interest to the date of the bankruptcy, it might not have been paid at all. Here, appellant was paid in full without any expense to it. This is not "inequity" or abrogation of lien rights. The *Beecher* case, hereinabove discussed, does not involve the destruction of a valid lien. The law as stated by this Court in the *Beecher* case has written by operation of law into a security instrument a provision that the security is only security for interest up to the date of bankruptcy.

It is in the nature of a bankruptcy proceedings to affect creditors' right and this includes the rights of secured creditors as well as unsecured creditors.

Wright v. Mountain Trust Bank, 300 U.S. 440, 470, 81 L.Ed 736, 747.

Referee Archie Katcher of Detroit, Michigan, in an article in 25 Journal of the National Association of Referees in Bankruptcy (April 1951) 40, entitled "A Re-examination of the Allowability of Interest on

Secured Claims'', which article was written before the decision in the *Beecher* case, stated:

“Many considerations favor stopping interest at the date of bankruptcy. It is now fundamental that where the property is subject to the jurisdiction of the Bankruptcy Court, the Court may, under proper circumstances, order the property sold free and clear of the claims of creditors holding security by way of mortgages or otherwise, and transfer the lien to the proceeds of the sale. And when such a sale is had and confirmed, it is idle to say that the secured creditor can rest upon his security. The only way for him to get his money is to file a secured claim, or petition, in the bankruptcy proceedings. Such a claim may be proved and allowed only in accordance with Section 63 of the Bankruptcy Act, which provides in sub-section a:

‘Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment, or an instrument in writing, absolutely owing at the time of the filing of a petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest;’

Certainly a mortgage and note are ‘instruments in writing’, and certainly ‘at that date’ (date of bankruptcy) the creditor could have recovered only interest to the date of bankruptcy. Moreover, when the Bankruptcy Court allows the secured claim, it in effect renders a judgment in favor of the secured claimant, as to which Section

63(a)(1) would have further application, cutting off interest at the date of bankruptcy. Or the finding of the Bankruptcy Court of the amount due the secured claimant might be considered to be a judgment rendered after bankruptcy, in which case Section 63(a)(5) which allows 'provable debts reduced to judgment after the filing of the petition . . . , less costs incurred and interest accrued after the filing of the petition and up to the entry of such judgment' would apply to halt interest at the date of bankruptcy. . . .

From every standpoint, better justice is accomplished by cutting off interest on secured claims at the date of bankruptcy, and requiring the showing of substantial equities before allowing any interest beyond that date."

In the case at bar the sales price of the property is sufficient to pay the principal plus interest to date of payment on the first deed of trust, but insufficient to pay the principal of the second deed of trust in full or to pay anything on the mechanic lien claims. Although the cases heretofore cited on this subject involve general unsecured creditors, appellee finds no distinction between the denial of the right of unsecured creditors to participate in the funds by the allowance of post-bankruptcy interest and this situation where the junior lien holders are the aggrieved parties.

CONCLUSION.

An examination and interpretation of all of the cases hereinabove discussed indicates that there is considerable confusion and difference of opinion. Such

an examination of all of the authorities clearly indicates, particularly with reference to the discussion of the history of our bankruptcy law as adopted from the English law, that the correct interpretation of the law is that made by this Court in the *Beecher* case and followed by the Court below.

It is respectfully submitted that under the decisions of the Supreme Court of the United States and of this Court, this Court should affirm the order of the District Court to the effect that Palo Alto Mutual Savings and Loan Association having been paid the principal of the indebtedness due it together with interest to the date of bankruptcy without any costs of collection, has been paid in full and is not entitled to interest for any period subsequent to the filing of the petition in bankruptcy. The order of the District Court of February 13, 1956, therefore, should be by this Court affirmed.

Dated, San Francisco, California,
October 30, 1956.

Respectfully submitted,

SHAPRO & ROTHSCHILD,
By AUGUST B. ROTHSCHILD,
Attorneys for Appellee.

DANIEL ARONSON, JR.,
Of Counsel.

(Appendix "A" Follows.)

Appendix "A"

Appendix "A"

Original. Filed June 11, 1953.

C. W. Calbreath, Clerk.

*In the United States District Court
Northern District of California
Southern Division*

In the Matter of

California Constructors, Inc.,

Bankrupt.

No. 38,991

In Bankruptcy

ORDER

The Prudential Insurance Company, a secured creditor of the bankrupt, has petitioned this Court to review the referee's order entered in this cause on February 26, 1953.

The referee correctly considered himself bound by *Beecher v. Leavenworth State Bank*, 192 F. 2d 10 (9th Cir. 1951) even though the law may be otherwise in the Sixth Circuit. See *In re Macomb Trailer Coach Inc.*, 200 F. 2d 611 (6th Cir. 1953). While the opinion in the *Beecher* case does not clearly indicate whether the proceeds from the sale of the security were sufficient to pay interest on the secured creditor's claim, the reasoning of the Court of Appeals is fully applicable to the case at bar. This Court, furthermore, sees no reason to disturb the referee's finding

that Prudential has proved no equities which would take this case out of the Beecher rule.

The referee's order is affirmed and his report approved.

Dated: June 10, 1953.

Edward P. Murphy,
United States District Judge.

No. 15,105

United States Court of Appeals
For the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

VS.

RALPH E. WILLIAMS, Trustee of the Es-
tate of John E. Duskin, Jr., formerly
doing business as John E. Duskin,
Jr., General Contractor, Bankrupt,
Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

LORENZ COSTELLO,

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No. 15,105

United States Court of Appeals For the Ninth Circuit

PALO ALTO MUTUAL SAVINGS AND LOAN
ASSOCIATION,

Appellant,

VS.

RALPH E. WILLIAMS, Trustee of the Es-
tate of John E. Duskin, Jr., formerly
doing business as John E. Duskin,
Jr., General Contractor, Bankrupt,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

APPELLANT'S REPLY BRIEF.

INTRODUCTION.

In synopsisizing our statement of facts, Appellee leaves out several important factors: Notably, that the security by its terms includes interest until principal is repaid, that Appellant is a savings and loan association, and that the loan was for construction of an improvement and all funds were so used to directly enhance the value of the security. Appellee's omission

of these facts was undoubtedly due to a desire for brevity rather than to an intentional oversight.

Appellee's statement of the question would be proper were it not for the use of the term "equitable reasons" in *Beecher v. Leavenworth State Bank*, 192 F. 2d 10. Because of the uncertainty of that term we feel a true statement of the question presented should include certain major differentiating factors of the case at hand. Hence our General Question (Appellant's Brief, page 4) and our Specific Question (Appellant's Brief, page 51).

Our reply to more specific points now follows.

REPLY ARGUMENT.

In answering our opening brief, Appellee cites and argues four Supreme Court cases (pages 3 to 10 inclusive) assumedly dealing with our question, but with a discussion so intermingled with excerpts from district Court opinions and old English writings that it is difficult to discover just what those Supreme Court cases held. To clarify, the Supreme Court cases cited by Appellee are as follows:

Coder v. Arts, 213 U.S. 223, 53 L.Ed. 772 (1908);

Sexton v. Dreyfus, 219 U.S. 339, 55 L.Ed. 244 (1911);

Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 91 L.Ed. 162 (1946);

City of New York v. Saper, 336 U.S. 328, 93 L.Ed. 710 (1948).

Initially, Appellee does not mention *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 79 L.Ed. 162 (1935), noted in our opening brief at pages 8 and 9 and holding that the rule denying post-bankruptcy interest

“ . . . has no application when the mortgage has a preferred claim against proceeds realized by the trustee from a sale of the security free of liens.”

Nonetheless, of these four Supreme Court decisions they do cite, only one, the *Vanston* case, deals with whether simple post-bankruptcy interest is allowed on a sale free and clear of liens in an otherwise insolvent estate. That case *did* allow it. (Appellant's opening brief, page 9).

Coder v. Arts was a case where the estate was *fully solvent*, and is excellent authority for a proposition not involved here. The *Sexton* case, where sales proceeds were *not* sufficient, has already been discussed. *City of New York v. Saper*, was an *unsecured* claim case for State franchise and unemployment insurance taxes, rightfully applied the unsecured creditor rule.

Appellee does not deny that the *Vanston* and *Louisville Joint Stock* cases do stand for allowing simple post-bankruptcy interest from otherwise insolvent estates where there is a sale free and clear and sufficient proceeds. Thus Appellee's general statement (Appellee's brief, page 9) that the Supreme Court has not ruled on this question is in error.

Appellee's next point is a discussion of 9th Circuit decisions, notably the *Beecher* case. None of it an-

swers the points set forth in our opening brief and it would be superfluous to repeat them again. Significant that Appellee lists two pages of sentences from the *Beecher* decision (Appellee's brief, pages 12, 13) as reasons for a rule that is inapplicable to the case at hand. Significant too, that they admit the *Beecher* case gives *no* indication of whether the security was worth more or less than the claims.

[The *Vanston* case and *Pacific States Corp. v. Hall* 166 F. 2d 688, both cited in *Beecher*, turned on this particular point (Appellant's opening brief, pages 14, 15)].

A security can have "proceeds" in two different ways. It can be sold, changing the whole property immediately to dollars. Or it can be held in investment and itself produce interest, rental, dividends or other income.

There was no sale of the security in the *Beecher* case. There being none, the Court specifically held that if it yielded proceeds in the *other* fashion by being income producing, that unqualifiedly these proceeds should be applied on post-bankruptcy interest.

Is there so basic a difference between the two means of yielding proceeds that in one case it is equitable to apply them on post-bankruptcy interest and in the other it is not, the proceeds in each case being sufficient? We think not.

Next, Appellee discusses some of the cases cited by Appellants on this question from the other 10 circuits, pointing out that several are not precisely on point.

Note carefully that Appellee does not cite *even one* circuit Court decision from *any other circuit* in which post-bankruptcy interest was *not* allowed in this type of secured claim case. Uniformly, following the *Vanston* and *Louisville Stock Bank* Supreme Court decisions, all other circuits allow it. The only "confusion and difference of opinion" (Appellee's reply brief, page 21) is correlating the *Beecher* case with the other circuit Court decisions in the 9th Circuit, with the two Supreme Court decisions on the point, and with Circuit decisions from all other circuits.

Prior to replying to Appellee's designation of "Equitable Principles", it is better to clarify that with which we are dealing. We are dealing first with a *secured* claim. We are *transferring the lien of that security* to the money proceeds of its sale. And we are *not in any way affecting general creditors*, since the sales proceeds are in no event sufficient to create a surplus for them regardless of whether or not the Appellant is allowed post-bankruptcy interest.

Appellee does not argue with the proposition that where the lien includes interest to date of payment, that lien is *not lessened* on attaching to the proceeds. Even the Bankruptcy Act (Section 57 (h)) specifically directs how this be done. Appellee does argue, however, that we should destroy the lien as to part of what it secures on the ground of doing "equity".

The practical side of the entire question then becomes important, especially in view of Appellee's spurious argument (Appellee's reply brief, page 19)

that Appellant would have had "additional costs" and "might have suffered losses" had not a sale free and clear of liens been made.

The power to sell free and clear of liens is not created by statute, but is an implied power to be used by the bankruptcy Court in the exercise of sound discretion.

As stated in 8 *Corpus Juris Secundum* at 1041 and 1042 (Sec. 311, (a)):

"The power to sell free and clear should be exercised sparingly; and the court must be satisfied, before it will order such a sale, that that course will advance the interests of the general creditors, and will not injuriously affect the interests of creditors holding liens on the property. According to the settled practice, the trustee should not be directed to take possession of the property and sell it if the liens equal the value of the property or if the property is encumbered to an amount exceeding its value, except on the request or with the consent of the lienholders. Nevertheless, the court has power to order a sale of property free of liens regardless of whether there was any equity in it for unsecured creditors, especially where the lienholders did not apply for leave to foreclose and the trustee did not petition to surrender the property as burdensome; and the sale may be ordered either with or without the consent of the lienholder."

The immediate conclusion is that where the property value is equal to or less than the total of the liens against it, bankruptcy Courts should allow foreclosure proceedings to continue under State law because in

neither event will any equity result for general creditors. This removes a burden from bankruptcy administration and in no way affects the rights and priorities existing and well known to all secured creditors at the time of obtaining their respective securities. Each junior lien claimant knows at the time of obtaining his security that it is subordinate to principal, interest and costs of foreclosure of each and every security superior to his. He gets exactly that for which he bargained. A far cry from the unsecured creditor, who also bargains for payment in full but gets only the debtor's ability and willingness to pay, with never any assurance of priority.

Building and loan associations loan only on first securities and always loan an amount less than the value of the property securing the same. Sound business judgment dictates this, State and Federal laws require it. On foreclosure they are either paid principal, interest and costs in full or take in the property itself free of all subordinate liens. In either event they have hardly suffered "losses" that Appellee would have this Court believe they are saving us from by sales free and clear.

It is common knowledge that for many years foreclosure proceedings have been allowed to proceed outside of bankruptcy where general creditors were unaffected and secured creditors got their originally bargained-for returns. There are two reasons why in recent times in this 9th Circuit this is not occurring so frequently.

First, the bankruptcy Court still has *power* to order a sale free and clear in bankruptcy regardless of

whether there is any equity resulting from unsecured creditors, even where the lienholders don't consent (8 *C.J.S.*, Sec. 311, *supra*). Secondly, where the sale is made within bankruptcy proceedings a 5% "commission" is allowed to be taken out of the proceeds by the bankruptcy Court. This latter of course is not available if foreclosure is allowed to be conducted outside of bankruptcy under State law.

The net effect is this: Where a debtor defaults under a first security, if he is not bankrupt, the first security holder gets what would amount to post-bankruptcy interest; if he is bankrupt and the foreclosure is allowed to proceed outside of bankruptcy again, the creditor gets what would amount to post-bankruptcy interest; if the sale is conducted in bankruptcy but subject to liens, the creditor still gets what amounts to post-bankruptcy interest; but if the foreclosure is carried on in bankruptcy by a sale free and clear the first secured creditor doesn't get post-bankruptcy interest, rather the next junior encumbrancer gets an amount equal to it, and the 5% fee is skimmed off the top. In none of the above four situations is the unsecured creditor affected.

We fail to see where any "equity" arises in the fourth situation above cited to warrant the abrogation of an established lien right. On the contrary, as in *Wilson v. Dewey*, 133 F. 2d 692 where this precise question arose, the only equitable as well as legal thing to do is to allow post-bankruptcy interest to all secured claimants in the order of their priority to the extent of sales proceeds and no further.

CONCLUSION.

In examining Appellee's reply brief, we note just prior to closing on page 21 that they say the "cases heretofore cited on this subject involve general unsecured creditors . . ." What is meant is that the cases *they* cite involve general unsecured creditors, for it is only in those cases that the post-bankruptcy interest stopping rule is announced and applied. They moreover admit that even in the *Beecher* case they ". . . cannot ascertain from the opinion whether the claims of Federal Land Bank of Spokane and of Leavenworth State Bank were secured at the time of the filing of the petition." (Appellee's reply brief, pages 11, 12).

The fact remains that all decisions cited involving *secured* creditors claims in this type of situation both in the Supreme and Circuit Courts do allow post-bankruptcy interest, and none disallow it. Sound logic and equity dictate that this rule should be followed in the 9th Circuit also, and that the District Courts order of February 13, 1956, should be reversed.

Dated, November 28, 1956.

Respectfully submitted,

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No. 15,105

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PALO ALTO MUTUAL SAVINGS AND LOAN
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RALPH E. WILLIAMS, Trustee of the Estate
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Bankrupt,

Appellee.

Brief of the State of California Amicus Curiae in Support of Appellants

Appeal from the United States District Court
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Brief of the State of California Amicus Curiae in Support of Appellants

Appeal from the United States District Court
for the Northern District of California, Southern Division

I.

NATURE OF THE STATE'S INTEREST

This amicus curiae brief has been filed by the State of California, sponsored by Edmund G. Brown, Attorney General of that State, pursuant to the Rules of the United States Court of Appeals for the Ninth Circuit (Rule 18, Subdiv. 9(c)). The State of California files this brief in support of the contentions of appellant that:

1. In bankruptcy proceedings secured creditors should be paid interest to the date of payment of their

secured debt if the security is adequate and the debt so provides.

2. *Beecher v. Leavenworth State Bank*, 192 F.2d 10 (9th Cir., 1951), was incorrectly decided and is contrary to holdings of the United States Supreme Court and of the Courts of Appeal in other circuits, and to the language of the Bankruptcy Act and the spirit and logic of bankruptcy proceedings.

The rule of the *Beecher* case is that unless the assets of a bankrupt's estate are sufficient to pay the principal and pre-bankruptcy interest of all claims (secured and unsecured) in full, no post-bankruptcy interest will be paid to a secured creditor even if his security is sufficient. This rule has been applied to all secured creditors. The State is vitally interested in the present proceeding since it frequently has tax liens on property of persons who become bankrupts. The rule of the *Beecher* case has been applied to deny the State post-bankruptcy interest on its liens.

While we subscribe fully to the contentions of appellant, it is our belief that neither the appellant nor the appellee has cited the line of cases which most clearly and adequately sets forth the viewpoint of the United States Supreme Court on the issues here presented. The best statement is found in *Ticonic Bank v. Sprague*, 303 U.S. 406, 413:

"This court has already held that a lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy." (Emphasis added.)

The rule stated in the *Ticonic* case has been cited with approval and followed in many other United States Supreme Court cases. Including^{ed} among the approving cases is *Vanston Bondholder's Protective Committee v. Green* (1946), 329 U.S. 156, 164. The *Vanston* case was relied on by the

Beecher case to reach a result contrary to the rules set forth in the *Vanston* and *Ticonic* cases.

For the reasons stated below we respectfully request this Court to review its decision in the *Beecher* case and adopt the general rule that secured creditors in bankruptcy are entitled to interest to the date of payment where the security is adequate.

II.

ARGUMENT

A. Introduction.

The *Beecher* case, *supra*, resulted in a radical and surprising change in bankruptcy proceedings in the Ninth Circuit by establishing a rule that is contrary to nearly every reported case or other authority in bankruptcy.

B. **As a General Rule the holder of a Valid Lien on Property of a Bankrupt May Assert the Lien Against the Property to the Same Extent as if the Bankruptcy Had Not Intervened.**

As a rule of thumb, it has always been clear that, as far as possible, liens on property are not to be disturbed by bankruptcy proceedings. In fact, the general rule is that the holder of a valid lien on property of a bankrupt may assert the lien against the property to the same extent as if bankruptcy had not intervened (*Goggin v. California Labor Div.*, 336 U.S. 118, 93 L.Ed. 543; *Yeatman v. New Orleans Sav. Inst.*, 95 U.S. 764, 767, 24 L.Ed. 589; 6 Am. Jur., pp. 1116-1117, Bankruptcy, § 949; Annotation, 75 L.Ed. 647.) It is, and has been, the general purpose of Congress to safeguard liens perfected before the bankruptcy (*Goggin v. Calif. Labor Div.* (1948), 336 U.S. 118, 126-127; *Hiscock v. Varick Bank*, 206 U.S. 28; *In re Knox-Powell-Stockton Co.* (9th Cir., 1939), 100 F.2d 979, 982, and authorities cited therein). In our research and experience, the *Beecher* rule as applied in this Circuit is the only example where the federal

courts have permitted the referees to reduce the amount due to a secured creditor where the security is adequate to pay the creditor in full.*

C. The Bankruptcy Act Treats Secured Claims in a Different Manner From Unsecured Claims.

At the outset, the difference between secured claims and secured creditors on one hand and unsecured claims and unsecured creditors on the other, must be clearly defined. By reason of the Bankruptcy Act, secured claimants who hold valid liens on property have been treated differently from unsecured claimants. The design of Congress is to protect all liens and lienholders except those liens which are void or voidable under the Bankruptcy Act (*In re Knox-Powell-Stockton Co.* (9th Cir., 1939), 100 F.2d 982 and authorities cited therein). The Bankruptcy Act does not vest in the trustee any greater rights in the property than belong to the bankrupt at the time when the trustee's title accrues (*Security Mtge. Co. v. Powers* (1928), 278 U.S. 149). The liens of secured creditors must remain undisturbed.

The broad purpose of bankruptcy is to marshal the bankrupt's assets for distribution to unsecured creditors. It is considered that secured creditors need not participate in bankruptcy proceedings, since they can look to their security. The Bankruptcy Act was formulated with the secured creditor precluded from participation in most of the bankruptcy proceedings. Briefly, we will illustrate some of the distinctions between the treatment of secured and unsecured creditors:

1. Under section 59b of the Bankruptcy Act (11 U.S.C. § 95), three or more creditors must join in the

*Of course, in all cases where security is sold in bankruptcy the costs of the sale are first deducted from the proceeds before payment of secured creditors.

petition for bankruptcy unless all the creditors of the bankrupt are less than twelve in number, in which case a single creditor may file a petition. The required number of petitioning creditors is jurisdictional. In computing the required number of creditors, those who have security or priority may not be counted unless their claims exceed the value of their securities or priorities.

2. With regard to the right to vote at creditors' meetings, only unsecured creditors of the bankrupt are entitled to vote. Under section 56 of the Bankruptcy Act (11 U.S.C., § 92), creditors holding claims which are secured, insofar as their right to vote depends on such claims, have no vote or voice at the creditors' meetings. Only if the secured creditor surrenders his security or by reason of the fact that his claim exceeds the value of his security and only for such excess is he allowed to vote.

3. Expenses of bankruptcy administration are solely chargeable against the general assets of the estate available for general creditors. The collateral of a secured creditor is chargeable only to the extent that the security is directly benefited thereby. (*In re Rice Leghorn Farm* [1953], 113 Fed. Supp. 903; *In re Danielle* [1953], 117 Fed. Supp. 178).

4. The requirements of time and requirements of proof of secured claims are entirely different from unsecured claims. The alternative courses available to secured creditors are well set forth in *United States v. Chase Bank* (1947), 331 U.S. 28, 33:

"Under these provisions [of the Bankruptcy Act], there are several avenues of action open to a secured creditor of a bankrupt. See 3 Collier on Bankruptcy (14th ed.) pp. 149-157, 255-259. (1) He may disregard

the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession. *In re Cherokee Public Service Co.*, 94 F.2d 536; *Ward v. First Nat. Bank*, 202 F. 609. (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, in as much as that court has exclusive jurisdiction over the liquidation of the security. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734. (3) He may surrender or waive his security and prove his entire claim as an unsecured one. *In re Medina Quarry Co.* 179 F. 929; *Morrison v. Rieman*, 249 F. 97. (4) He may avail himself of his security and share in the general assets as to the unsecured balance. *Merrill v. National Bank of Jacksonville*, 173 U.S. 131; *Ex parte City Bank*, 3 How. 292, 315."

5. All unsecured creditors with provable claims who had notice of the proceedings may be discharged in bankruptcy. Secured claims may not be affected by a discharge in regular bankruptcy proceedings but survive the debtor's discharge as to the amount of the security.

D. Post-Bankruptcy Interest on Secured Claims Should Be Paid to the Date of Payment to the Extent of the Security if the Statute or Security Debt so Provides.

1. THE UNITED STATES SUPREME COURT HAS UNEQUIVOCALLY RULED THAT SECURED CREDITORS SHOULD BE PAID INTEREST TO DATE OF PAYMENT.

The United States Supreme Court has clearly and unequivocally stated its position on the issue here involved. In *Ticonic National Bank v. Sprague* (1938), 303 U.S. 406, 413, the United States Supreme Court held that a secured creditor, who has a lien on assets which are sufficient to pay the principal and interest of the lien, is entitled to interest to

the date of payment of his debt, even though the total assets of the insolvent party are not sufficient to pay in full all creditors' claims.

Ticonic National Bank v. Sprague, 303 U.S. 406, 413 concerned an insolvent bank in receivership. The court approved the payment to secured claimants of interest which accrued during the administration of the receivership. The court also stated (p. 413):

*"With respect to analogous liquidations the rule just announced has been long in force. This Court has already held that a lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (Coder v. Arts, 213 U.S. 223, 245, affirming 152 Fed. 943, 950) * * *". (Emphasis added.)*

We respectfully submit that the *Ticonic* case is determinative of the issue here involved. It is significant to note that the *Ticonic* case was neither cited nor discussed in the *Beecher* case. The *Ticonic* case and the principle there involved have been cited and approved by the United States Supreme Court in a number of bankruptcy cases. See for example *Vanston Bondholder's Protective Committee v. Green* (1946), 329 U.S. 156, 164; *Reconstruction Finance Corp. v. Denver & Rio G. W. R. Co.* (1946), 328 U.S. 495, 521, ftnt. 25; *Group of Investors v. Milwaukee R. Co.* (1943), 318 U.S. 523, 573; *Ecker v. Western Pac. R. R.* (1943), 318 U.S. 448, 510.

In the *Reconstruction Finance* case, *supra*, the court stated at page 521 in footnote 25 concerning a corporate reorganization in bankruptcy:

*"Interest accrues on the secured claims until the effective date of the plan."**

*The effective date of a plan is of necessity long after the petition in bankruptcy is filed.

the bankruptcy proceeding, decline to file a claim and rely solely upon his security if that security is properly and solely in his possession. *In re Cherokee Public Service Co.*, 94 F.2d 536; *Ward v. First Nat. Bank*, 202 F. 609. (2) He must file a secured claim, however, if the security is within the jurisdiction of the bankruptcy court and if he wishes to retain his secured status, in as much as that court has exclusive jurisdiction over the liquidation of the security. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734. (3) He may surrender or waive his security and prove his entire claim as an unsecured one. *In re Medina Quarry Co.* 179 F. 929; *Morrison v. Rieman*, 249 F. 97. (4) He may avail himself of his security and share in the general assets as to the unsecured balance. *Merrill v. National Bank of Jacksonville*, 173 U.S. 131; *Ex parte City Bank*, 3 How. 292, 315."

5. All unsecured creditors with provable claims who had notice of the proceedings may be discharged in bankruptcy. Secured claims may not be affected by a discharge in regular bankruptcy proceedings but survive the debtor's discharge as to the amount of the security.

D. Post-Bankruptcy Interest on Secured Claims Should Be Paid to the Date of Payment to the Extent of the Security if the Statute or Security Debt so Provides.

1. THE UNITED STATES SUPREME COURT HAS UNEQUIVOCALLY RULED THAT SECURED CREDITORS SHOULD BE PAID INTEREST TO DATE OF PAYMENT.

The United States Supreme Court has clearly and unequivocally stated its position on the issue here involved. In *Ticonic National Bank v. Sprague* (1938), 303 U.S. 406, 413, the United States Supreme Court held that a secured creditor, who has a lien on assets which are sufficient to pay the principal and interest of the lien, is entitled to interest to

the date of payment of his debt, even though the total assets of the insolvent party are not sufficient to pay in full all creditors' claims.

Ticonic National Bank v. Sprague, 303 U.S. 406, 413 concerned an insolvent bank in receivership. The court approved the payment to secured claimants of interest which accrued during the administration of the receivership. The court also stated (p. 413):

*"With respect to analogous liquidations the rule just announced has been long in force. This Court has already held that a lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (Coder v. Arts, 213 U.S. 223, 245, affirming 152 Fed. 943, 950) * * *". (Emphasis added.)*

We respectfully submit that the *Ticonic* case is determinative of the issue here involved. It is significant to note that the *Ticonic* case was neither cited nor discussed in the *Beecher* case. The *Ticonic* case and the principle there involved have been cited and approved by the United States Supreme Court in a number of bankruptcy cases. See for example *Vanston Bondholder's Protective Committee v. Green* (1946), 329 U.S. 156, 164; *Reconstruction Finance Corp. v. Denver & Rio G. W. R. Co.* (1946), 328 U.S. 495, 521, ftnt. 25; *Group of Investors v. Milwaukee R. Co.* (1943), 318 U.S. 523, 573; *Ecker v. Western Pac. R. R.* (1943), 318 U.S. 448, 510.

In the *Reconstruction Finance* case, *supra*, the court stated at page 521 in footnote 25 concerning a corporate reorganization in bankruptcy:

*"Interest accrues on the secured claims until the effective date of the plan."**

*The effective date of a plan is of necessity long after the petition in bankruptcy is filed.

The *Vanston* case is particularly noteworthy since it is the case relied upon in the *Beecher* decision. It is respectfully submitted that the court in the *Beecher* case misinterpreted the *Vanston* case since this court in the *Beecher* case while relying on the *Vanston* case failed to note the following quotation:

“Simple interest on secured claims accruing after the petition was filed was denied *unless the security was worth more than the sum of principal and interest due.*” (Emphasis added.) (*Vanston etc. v. Green* (1946), 329 U.S. 156, 164)

None of the cases cited immediately above, except the Vanston case, has been cited by the appellant or appellee in the present case. Not only should these cases be considered by the court, but we respectfully submit that these cases are controlling as to the present issues.

Another United States Supreme Court decision unmentioned by either appellant or appellee presents an analogous problem. In *Security Mtge. Co. v. Powers* (1928), 278 U.S. 149, attorney’s fees were provided for in the basic obligation. The court held that attorney’s fees were held to be part of the mortgage debt, and allowed the fees to be collected out of the security, even though the fees accrued after adjudication of bankruptcy.

In addition, the Supreme Court of the United States, in *Sexton v. Dreyfus* (1911), 219 U.S. 339, stated:

“The view that *we adopt* is well presented in the late Judge Lowell’s work on Bankruptcy, section 419; seems to have been entertained in *Coder v. Arts*, 8th Cir., 152 Fed. 943, 950 * * *” (Emphasis added.)

The view presented in section 419 of Judge Lowell’s work which the Supreme Court of the United States adopted is that interest on secured claims is payable to the date that

the principal is paid if the security is sufficient to pay both principal and interest, even if the assets of the bankrupt are not sufficient to pay other unsecured creditors in full. The general creditors cannot object since the security belongs, not to the bankrupt, but to the secured creditor (See an excellent discussion of this problem in *In re Tele-Tone Radio Corp., etc.* (D.C. N.Y., 1955), 133 F. Supp. 739, 751). The opening sentence of section 419 of Judge Lowell's work states:

"If the security exceeds the debt, the creditor receives interest until the settlement with the assignees [the bankruptcy trustee] whether by redemption, sale or otherwise."

Furthermore, *Coder v. Arts*, 152 Fed. 950, as cited by the Court in the *Sexton* case, states:

"But the proceeds of these mortgaged lands appear to be ample to pay the principal and interest of the debt to the mortgagee, Arts, and where a trustee sells mortgaged property of the Bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt as well as to the principal, out of the proceeds, in accordance with the terms of the note and mortgage."

The United States Supreme Court, in affirming the lower court in *Coder v. Arts* (1909), 213 U.S. 223, 245, unequivocally approved the payment of interest to the date on which the principal was paid. The Court stated:

"Nor do we think the circuit court of appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt."

See also, *Louisville Joint Stock Land Bank v. Radford* (1935), 295 U.S. 555; *American Iron Co. v. Seaboard Air*

Line (1914), 233 U.S. 261; *U. S. v. Paddock* (5th Cir., 1951), 187 F.2d 271; *Oppenheimer v. Oldham* (5th Cir., 1949), 178 F.2d 386; *Wilson v. Dewey* (8th Cir., 1943), 133 F.2d 962, 965.

The only support for appellee's contentions is dicta found in a footnote at page 330 in *City of New York v. Saper* (1949), 336 U.S. 328. The *Saper* case was not concerned with secured claims but with unsecured claims. The footnote relied upon by the appellees concerns the purported English practice. (See the apparent confusion in English bankruptcy law on secured claims discussed in *Merrill v. National Bank of Jacksonville* (1898), 173 U.S. 131, 174; Hanson, Secured Creditor of Insolvent, 34 Mich. L. Rev. 309, 324-328 (1936).) The implication in this footnote in the *Saper* case is clearly contrary to the rule laid down by the United States Supreme Court in the many cases discussed above.

2. POST-BANKRUPTCY INTEREST ON SECURED CLAIMS IS ALLOWED IN ALL CIRCUITS BUT THE NINTH; AND EVEN IN THE NINTH, THE RULE WAS THE SAME AS THE OTHER CIRCUITS UNTIL THE BEECHER CASE.

The courts in all other circuits have been contrary to the *Beecher* case, *supra*. A summary of the authorities is found in the case of *In re McComb Trailer Coach, Incorporated* (6th Cir., 1953), 200 F.2d 611, cert. denied, Sub. nom., 345 U.S. 958. This case categorically and expressly disagrees with the result in the *Beecher* case. It is demonstrated in the *McComb* case that not only is it the view of the United States Supreme Court but it is the view of the courts of appeal of all the circuits except the Ninth that interest on secured claims should be paid to the date of payment of the principal up to the amount of the security.

In addition to the cases cited and discussed above, and in addition to the cases used by appellant and appellee, the following cases are contrary to the rule in the *Beecher* case:

Worhtown Theatre Corporation v. Mickelson (8th Cir., 1955), 226 F.2d 212; *Eddy v. Prudence Bank Corp.* (2d Cir., 1947), 165 F.2d 157, 160, *cert. denied*, 333 U.S. 845; *Miles Company v. Tendel* (8th Cir., 1939), 107 F.2d 729, 732; *In re Kashmir* (2d Cir., 1938), 94 F.2d 652; *Board of Com'rs of Sweetwater County v. Bernardin* (10 Cir., 1934), 74 F.2d 809, 831; *Merchants Transfer & Storage Co. v. Rafferty* (2d Cir., 1931), 48 F.2d 540, 542; *Mty. Co. v. Livingston* (8th Cir., 1930), 45 F.2d 28, 33; *People's Homestead Association v. Bartlette* (5th Cir., 1929), 33 F.2d 561; *Brown v. Leo* (2d Cir., 1929), 34 F.2d 127; *Phoenix Bldg. & Homestead Assocn. v. E. A. Carrere's Sons* (5th Cir., 1929), 33 F.2d 563; *In re International Raw Material Corporation* (2d Cir., 1927), 22 F.2d 920; *San Antonio Loan & Trust Co. v. Booth* (5th Cir., 1924), 2 F.2d 590; *In re Bowen* (E.D. Pa., 1942), 46 F. Supp. 631, 640; *In re Hagin* (La. D.C. 1927), 21 F.2d 434; *In re Stamps* (N.D. Georgia, 1924), 300 Fed. 162; *In re Hershberger* (M.D., Pa., 1913), 208 Fed. 94; *In re Stevens* (1909; D.C.), 173 Fed. 842; *In re Albert* (W.D.N.Y., 1908), 173 Fed. 691.

3. THE TEXTS AND ENCYCLOPEDIAS ANALYZE THE CASES AS REQUIRING THE PAYMENT OF POST-BANKRUPTCY INTEREST TO THE DATE OF PAYMENT.

In addition to the case authorities it is interesting to note that the texts and encyclopedias analyze the cases as requiring payment of post-bankruptcy interest to the date of payment of principal (3 Collier on Bankruptcy, p. 1840 (1941, 14th Ed.); 2 Remington on Bankruptcy, sec. 916, 2605; 6 Am. Jur., sec. 487, 1225; 8 C.J.S., secs. 242, 322, 422; 134 A.L.R. 846, 847-848). This rule has been well established for many years. In discussing the distribution of proceeds after a sale of property by a trustee, Remington on Bankruptcy, Vol. 6, sec. 2605 states:

“The rights of any particular lienholder against the sale proceeds depend, first of all, upon the amount due him under the terms of the instrument or agreement upon which he bases his claim to participate in the avails. He is entitled to interest if the obligation secured provides for its payment in accordance with the terms of such obligation, and it is computable to date of payment of the lien, not merely to filing of the bankruptcy petition, although such is not the case if the sale proceeds are insufficient to pay the full amount plus interest, in that event any interest which would remain by way of deficiency being collectible only to date of filing of the petition.”

It is respectfully submitted that this statement presents the proper state of the law.

E. The Incorrect Rule of the Beecher Case is Being Given Full Application Against State Tax Liens.

The *Beecher* case has been applied by the District Courts and by the bankruptcy courts in this circuit to the secured claims of the State of California, including the secured claims which arise out of taxes owing by the bankrupt. Under the provisions of many of the tax statutes of the State of California, tax administrators may record in the Office of a County Recorder a certificate specifying the amount of taxes, interest and penalties due the State, and from the time of the filing of the certificate, a lien for all principal, interest and penalties is created upon all real property of the delinquent taxpayer in the county. The recorded lien has the same force and effect of a judgment lien (See, for example, Revenue & Taxation Code sections 6757 (Sales and Use Taxes); 7871 to 7872 (Motor Vehicle Fuel Tax); 26161 to 26162 (Bank and Corporation Taxes); 18881 to 18882 (Personal Income Taxes), and Unemployment Insurance Code section 1703 (Unemployment Insurance Taxes)).

We respectfully submit that the denial of interest on State tax liens for the period after the filing of the petition in bankruptcy to the date of payment is erroneous and is without legal support. The *Beecher* case has erroneously resulted in the State being denied interest for that period.

III.

CONCLUSION

We respectfully submit that in bankruptcy secured creditors should be paid interest to the date of payment if the security is adequate and the debt so provides. We further respectfully submit that *Beecher v. Leavenworth State Bank*, 192 F.2d 10 (9th Circuit, 1951) should be overruled as to this issue.

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Respectfully submitted,

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